ALF Properties Sdn Bhd v Ketua Pengarah Jabatan Hasil Dalam Negeri

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–01–203 OF 1997
MOKHTAR SIDIN, ABDUL AZIZ JJCA AND RAUS SHARIFF J
14 MAY 2005

Revenue Law — Income tax — Appeal against assessment — Sale of land — Whether contrary to findings of Special Commissioners and High Court, there was evidence that appellants held subject land as an investment — Whether gains from trade of property developer

Revenue Law — Income tax — Land — Sale of — Whether profits were capital or income

The appellants, a private limited company, were incorporated on 8 August 1979. Their principal object was to carry on 'the business of property developers and building contractors'. On 28 March 1980 they purchased seven lots of land at a public auction ordered under s 259 of the National Land Code forRM6,100,000. The seven lots had a total area of 190,248.30 square feet. On20 August 1982, the appellants obtained approval from the Kuala Lumpur City Hall to build a 31-storey office block on the land. In the Annual Report dated 4 June 1983, the Chairman of Hoklian Holdings Sdn Bhd, which had through its wholly-owned subsidiary company 50% equity participation in the appellants said that: 'the company has also through its wholly-owned subsidiary, Hoklian Development Sdn Bhd, entered into a joint-venture with Koperasi Jaya Diri Malaysia Bhd on a 50 : 50 basis, to acquire the entire issued capital of ALF Properties Sdn Bhd for $41.25 million … Plans are being made to develop the said land into an office complex for rental. The Board foresees the prevailing good demand for office space in Kuala Lumpur will enable the company to enjoy very good rental income' ('the Chairman's statement'). Itwas not disputed that at the time when the statement was made, the maker of the statement had not acquired any interest in the appellants' company. Itwas also not disputed that at that time the appellant and Hoklian Holdings Bhd were two separate legal entities. Out of the total 190,000 sq ft of the appellant's land only 101,004.75 sq ft was required and approved for the purpose of the proposed 31-storey office block building. Sometime after 20 August 1982 but before 23 April 1985 a new management took over the appellant's company. The original plans of the proposed 31-storey office block building which were approved on 20 August 1982, were amended by the new management to one of a 30-storey office block building. The amended plans were approved vide development order dated 24 April 1985. It was also not disputed that before the plans were drawn out, the appellant had incurred fees in drawing the development and building plans and testing the soil which the appellant called 'development expenditure'. This development expenditure also included compensation paid to squatters and clearing of site. At the material time the

total development expenditure was RM1.44 million. It was in evidence and not disputed that from 1987 to 1990 part of the land was rented out and the income was charged to tax and assessed by the Inland Revenue Department as rental income under s 4(d) of the Income Tax Act 1967. Ten or 11 years later, the appellant entered into a sale and purchase agreement with another company to sell to that company four of the lots, which had a total area of 101,004.75 square feet ('the subject land'), for RM42,500,000. On the gains from the sale, the appellants were assessed to income tax of RM13,185,916.09. The appellants appealed to the Special Commissioners on the ground that the gains were derived not from the carrying on of their business but from the sale of an investment and were therefore not assessable to income tax. The Special Commissioners found that the appellants failed to show that the subject land was held by them as an investment and dismissed their appeal. Their appeal to the High Court was also dismissed. The question in this appeal was whether, contrary to the findings of the Special Commissioners and the High Court, there was evidence that the appellants held the subject land as an investment. The appellants, among others, argued that their intention to hold the subject land as an investment, as indicated by their revaluation of the land, 'continued and was resubstantiated' by a statement made by the Chairman of Hoklian Holdings Berhad.

Held, allowing the appeal:

(1) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) It was not safe for the Special Commissioners to come to the conclusion that the appellants' principal activity was dealing in property merely on the ground that it was one of the stated objects of the appellant as found in its Memorandum and Articles of Association. To come to a safe conclusion one had to go into the activities of the appellants whether in the past or in the present to find out whether the activities were one of the stated objects of the appellants (see para 16).

(2) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) Purchasing of immovable property by itself could not be said to be the sole object of the appellants because there was another object of the appellants in respect of land, that was investment in land. These two objects were so closely related that one had to examine the whole transaction before one could come to a correct conclusion whether that activity constituted business or dealing in land or whether it was an investment (see para 19).

(3) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) In order to come to the correct conclusion the court had to see what was the intention of the appellants when they purchased the subject land; whether the property was to be kept for long-term investment or whether it was purchased and to be resold at a profit as soon as possible or to be developed and

to be sold in the developed form and made profit from the transaction. It was not disputed that a property kept for investment would eventually be sold but the profit realised from the sale would be capital realisation and not subject to tax. From the authorities it was clear that a property kept for some time from the time it was purchased would be considered as an investment and not business dealing in land. The authorities also showed that a property purchased and sold soon after would not be considered as a dealing in land when there was no evidence to show that preparation being made for the sale (see para 20).

(4) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) The court could not find any evidence to show that the character of the land had been changed. The Special Commissioners did not specify the change from which character to which character. If the Special Commissioners meant the change of character was from a vacant land to an office block, then the Special Commissioners would obviously be in error. The subject property was situated within the golden triangle, an area where the potentiality of the land being developed was very eminent. It was up to the various landowners what type of building to be built on their land whether an office block, a commercial complex, a hotel or an apartment. There was no necessity for the owners (including the appellants) to apply for conversion or change of character because the land were situated in an area to be developed as such (see para 41).

(5) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) The evidence showed that the subject property was the only property bought and kept by the appellants for investment. There was no evidence to show that the appellants had been dealing in land before they acquired the subject property. There was no evidence to show that the appellants had other transactions in properties before. There was also no evidence to show that the appellants were a developer before the transaction. The purchase of the said property was the only transaction carried out by the appellants. As such it could not be said that dealing in land was the principal activity of the appellant (see para 42).

(6) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) The length of time a person holding a property or a piece of land was an indicator whether the land was for investment or otherwise. Investment was one of the objects stated in the appellants' Memorandum and Articles of Association. Holding the land for more than ten years was a clear indication that the appellants, when they purchased the subject property, did it for investment (see para 44).

(7) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) The appellants maintained throughout that the subject land was held as a long-term investment. The appellants had revalued the subject land and entered

the revalued amount in the account. This revalued amount and the development expenditure had been entered in the account and the balance sheet of the appellants consistently under the heading of 'development properties' which was under the main heading of 'fixed assets'. Under this main heading was also found the heading of 'land and development expenditure'. Though the heading of 'land for investment' was not used for the heading of 'development properties', the subject land was to be held for investment and that was the reason why it was placed under the main heading of 'fixed assets'. The terminology 'development properties' was used because the subject was earmarked for development of a 30-storey office complex. The appellants did not put it under the 'land held for development and resale' because it was not the intention of the appellant to resell the subject land. The land was to be developed into a 30-storey office block and the subject land and the office block to be held as long-term investment. That was the reason why the entry was made that the subject land came under the main heading 'fixed assets' and not 'current assets' or 'stock-in-trade'. It might be the wrong terminology but the fact remained that the subject land was intended and held as investment throughout (see para 51).

(8) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) The Special Commissioners were in error in trying to juggle the subject land to be under what heading or item in the account. It was not the duty of the Special Commissioners. The duty of the Special Commissioners was to decide whether the entry made was really what it was purported to be and not try to correct it. It was for the Special Commissioners to decide whether the subject land was actually a 'fixed asset' as stated by the appellants or otherwise (see para 53).

(9) (per **Mokhtar Sidin JCA**, **Raus Sharif J** concurring) It would not make any difference whether the appellants disposed of the whole subject land or a portion of it. In either case it was a disposal of a capital asset (see para 58).

(10) (per **Abdul Aziz JCA** dissenting) The Chairman's statement was not the appellants' statement but was only one emanating from a party which, while anticipating the acquisition of 50% interest in the appellant, had not yet acquired it, so that the intention mentioned by the Chairman cannot be accepted as proof of the appellants' intention. The decision of *Waylee Investment Ltd v Commissioner of Inland Revenue* [1990] STC 780 cannot be applied to this case because the appellants were not under the exclusive control of Hoklian Developments Sdn Bhd or Hoklian Holdings Bhd and were not their wholly-owned subsidiary (see para 75).

(11) (per **Abdul Aziz JCA** dissenting) While the shortness of the holding period may be a positive indication of a trading purpose, it does not

necessarily follow that a long holding period is a positive indication of an intention to invest (see para 82).]

[**Bahasa Malaysia summary**

Perayu adalah sebuah syarikat sendirian berhad yang ditubuhkan pada 8 Ogos 1979. Tujuan utama mereka adalah untuk menjalankan 'perniagaan pemaju hartanah dan kontraktor binaan'. Pada 28 Mac 1980 mereka telah membeli tujuh lot tanah dalam satu lelongan awam yang diperintahkan di bawah s 259 Kanun Tanah Negara untuk harga sebanyak RM6,100,000. Keluasan keseluruhan tujuh lot tersebut adalah 190,248.30 kaki persegi. Pada 20 Ogos 1982, perayu mendapat kelulusan dari Dewan Bandaraya Kuala Lumpur untuk membina satu blok pejabat 31-tingkat di atas tanah tersebut. Di dalam laporan tahunan bertarikh 4 Jun 1983, Pengerusi Hoklian Holdings Sdn Bhd, yang melalui anak syarikat penuhnya, mempunyai 50% equiti di dalam perayu menyatakan bahawa: 'Syarikat ini juga telah, melalui anak syarikat penuhnya, Hoklian Development Sdn Bhd, memasuki satu usaha sama dengan Koperasi Jaya Diri Malaysia Bhd pada asas 50–50, untuk memiliki keseluruhan modal keluaran ALF Properties Sdn Bhd pada harga $41.25 juta … Rancangan-rancangan sedang dibuat untuk memajukan tanah tersebut sebagai satu kompleks pejabat untuk sewaan. Lembaga pengarah menjangka akan terdapat permintaan yang bagus untuk ruang pejabat di Kuala Lumpur yang akan membolehkan Syarikat memperoleh pendapatan yang memuaskan dari sewaan' ('Kenyataan Pengerusi'). Adalah tidak dipertikaikan bahawa pada ketika kenyataan itu dibuat, pembuat kenyataan itu belum lagi memiliki kepentingan di dalam syarikat perayu. Ianya juga tidak dipertikaikan bahawa pada ketika itu perayu dan Hoklian Holdings Bhd adalah dua entiti sah yang berasingan. Dari jumlah 190,000 kaki persegi tanah perayu, hanya 101,004.75 kaki persegi yang diperlukan dan yang diluluskan untuk tujuan bangunan 31 tingkat blok pejabat yang dicadangkan itu. Pada satu masa selepas 20 Ogos 1982 tetapi sebelum 23 April 1985 pengurusan baru mengambil alih syarikat perayu. Pelan asal cadangan bangunan blok pejabat 31 tingkat yang diluluskan pada 20 Ogos 1982, telah dipinda oleh pengurusan baru kepada satu bangunan blok pejabat 30 tingkat. Pelan-pelan yang terpinda itu telah diluluskan melalui perintah pembangunan bertarikh 24 April 1985. Ianya juga tidak dipertikaikan yang bahawa sebelum pelan-pelan itu dilukis, perayu telah membuat perbelanjaan iaitu yuran untuk membuat pelan-pelan pembangunan dan bangunan dan untuk ujian tanah yang mana dipanggil oleh perayu sebagai 'perbelanjaan pembangunan'. Perbelanjaan pembangunan ini juga termasuk pampasan yang dibayar kepada setinggan-setinggan dan pembersihan tapak. Pada masa matan jumlah perbelanjaan pembangunan adalah RM1.44 juta. Ianya terbukti dan tidak di pertikaikan bahawa dari 1987 sehingga 1990 sebahagian dari tanah tersebut telah disewakan dan pendapatan tersebut dikenakan cukai dan ditaksirkan oleh Jabatan Hasil Dalam Negeri sebagai pendapatan sewaan di bawah s 4(d) Akta Cukai Pendapatan 1967. Sepuluh atau sebelas tahun

kemudian, perayu telah memasuki satu perjanjian jual beli dengan satu syarikat yang lain untuk menjual kepada syarikat tersebut empat lot tanah tersebut, yang mana jumlah keseluruhannya adalah 101,004.75 kaki persegi ('tanah berkenaan'), untuk RM42,500,000. Ke atas perolehan dari jualan tersebut, perayu ditaksirkan cukai pendapatan sebanyak RM13,185,916.09. Perayu merayu kepada Pesuruhjaya Khas atas alasan yang perolehan tersebut tidak diperoleh dari urus niaga perniagaan mereka tetapi dari jualan pelaburan dan dari itu tidak tertakluk kepada taksiran cukai pendapatan. Pesuruhjaya Khas memutuskan yang perayu-perayu gagal menunjukkan yang tanah berkenaan dipegang oleh perayu sebagai satu pelaburan dan menolak rayuan mereka. Rayuan mereka ke Mahkamah Tinggi juga ditolak. Persoalan dalam rayuan tersebut ialah sama ada bertentangan dengan keputusan Pesuruhjaya Khas dan Mahkamah Tinggi, terdapat bukti yang perayu memegang tanah tersebut sebagai satu pelaburan. Perayu-perayu antara lain menghujahkan bahawa niat mereka memegang tanah tersebut sebagai pelaburan adalah seperti yang ditunjukkan oleh nilaian semula yang dibuat oleh mereka berhubung dengan tanah tersebut, 'terus dan disokong' oleh kenyataan yang dibuat oleh Pengerusi Hoklian Holdings Berhad.

Diputuskan, membenarkan rayuan itu:

(1) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Ianya tidak selamat bagi Pesuruhjaya Khas untuk mencapai keputusan bahawa kegiatan utama perayu adalah berurus niaga dengan hartanah hanya atas alasan bahawa ia adalah salah satu dari tujuan perayu sebagaimana yang terkandung di dalam Memorandum dan Perkara-Perkara Pertubuhan. Untuk mencapai keputusan yang selamat ia harus meneliti kegiatan-kegiatan perayu sama ada yang lampau atau semasa untuk menentukan sama ada kegiatan-kegiatan tersebut salah satu dari tujuan perayu yang dinyatakan (lihat perenggan 16).

(2) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Membeli satu harta tak alih semata tidak boleh dikatakan menjadi tujuan utama perayu kerana terdapat satu lagi tujuan perayu berhubung dengan hartanah, iaitu pelaburan dalam hartanah. Kedua-dua tujuan ini berkait rapat dan adalah perlu ditelitikan keseluruhan urus niaga tersebut sebelum satu keputusan yang betul dicapai sama ada kegiatan tersebut adalah satu urus niaga atau satu pelaburan (lihat perenggan 19).

(3) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Untuk mencapai keputusan yang betul mahkamah perlu melihat apakah niat perayu apabila ia membeli tanah tersebut; sama ada hartanah itu untuk disimpan sebagai pelaburan jangka panjang atau sama ada ia dibeli dan akan dijual semula pada keuntungan secepat mungkin atau untuk dimajukan atau dijual selepas dimajukan dan keuntungan dibuat dari urus niaga tersebut. Ianya tidak dipertikaikan yang bahawa sesuatu hartanah yang

disimpan sebagai satu pelaburan akan akhirnya dijual tetapi keuntungan yang diperoleh dari jualan tersebut akan menjadi penghasilan modal dan tidak dikenakan cukai. Dari autoriti-autoriti ianya jelas bahawa hartanah yang disimpan untuk seketika dari masa ia dibeli akan dianggap sebagai satu pelaburan dan bukan satu urus niaga hartanah. Autoriti-autoriti juga menunjukkan yang bahawa sesuatu hartanah yang dibeli dan dijual dengan cepat selepas itu tidak akan dianggap sebagai satu urus niaga hartanah apabila tiada keterangan yang menunjukkan persediaan dibuat untuk jualan (lihat perenggan 20).

(4) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Mahkamah tidak dapat menjumpai sebarang keterangan yang menunjukkan ciri-ciri hartanah telah ditukar. Pesuruhjaya Khas tidak menyatakan pertukaran dari ciri mana ke ciri mana. Jika Pesuruhjaya Khas bermaksud pertukaran ciri adalah dari satu tanah kosong kepada satu blok pejabat, maka Pesuruhjaya Khas ternyata tersilap. Hartanah tersebut terletak di dalam segi tiga emas, satu kawasan di mana potensi untuk dimajukan adalah tinggi. Ianya terserah kepada tuanpunya tanah menentukan bangunan apa yang akan didirikan di atas tanah mereka sama ada blok pejabat, kompleks komersial, hotel atau pangsapuri. Tiada keperluan bagi tuanpunya tersebut (termasuklah perayu) untuk memohon penukaran atau pertukaran ciri kerana tanah tersebut berada di dalam satu kawasan yang akan dimajukan sedemikian (lihat perenggan 41).

(5) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Keterangan menunjukkan yang bahawa hartanah berkenaan adalah satu-satunya hartanah yang dibeli dan disimpan oleh perayu sebagai pelaburan. Tidak terdapat keterangan yang menunjukkan bahawa perayu telah berurus niaga dalam hartanah sebelum mereka membeli tanah berkenaan. Tiada keterangan yang menunjukkan bahawa perayu mempunyai urus niaga hartanah sebelum ini. Juga tiada terdapat keterangan yang menunjukkan perayu adalah seorang pemaju sebelum urus niaga ini. Pembelian tanah tersebut adalah satu-satunya transaksi yang dilakukan oleh perayu. Oleh yang demikian ianya tidak boleh dikatakan bahawa urus niaga hartanah adalah kegiatan utama perayu (lihat perenggan 42).

(6) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Tempoh masa seseorang memegang sesuatu hartanah atau sebidang tanah adalah satu tanda sama ada tanah tersebut adalah untuk pelaburan atau sebaliknya. Pelaburan adalah salah satu dari tujuan yang dinyatakan di dalam Memorandum dan Perkara-Perkara Pertubuhan perayu. Memegang tanah tersebut lebih dari sepuluh tahun adalah satu tanda yang jelas bahawa perayu, apabila mereka membeli tanah tersebut, berbuat demikian untuk tujuan pelaburan (lihat perenggan 44).

(7) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Perayu bertegas bahawa tanah tersebut dipegang sebagai satu pelaburan jangka panjang. Perayu telah menilai semula tanah berkenaan dan memasukkan jumlah yang dinilai semula itu di dalam akaun. Nilai semula ini dan perbelanjaan pembangunan telah dimasukkan di dalam akaun dan kunci kira-kira perayu setiap kali di bawah tajuk 'hartanah dimajukan' yang juga di bawah tajuk utama 'asset tetap'. Di bawah tajuk utama ini juga didapati tajuk 'tanah dan perbelanjaan pembangunan'. Walaupun tajuk 'tanah untuk pelaburan' tidak digunakan sebagai tajuk 'hartanah dimajukan', tanah berkenaan dipegang sebagai satu pelaburan dan itu adalah sebab kenapa ianya ditempatkan di bawah tajuk utama 'aset tetap'. Istilah 'hartanah dimajukan' digunakan kerana tanah tersebut di tanda untuk pembangunan kompleks pejabat 30 tingkat. Perayu tidak meletakkannya di bawah 'tanah dipegang untuk pembangunan dan jualan semula' kerana ianya bukan niat perayu untuk menjual semula tanah tersebut. Tanah tersebut adalah untuk dimajukan sebagai blok pejabat 30 tingkat dan tanah tersebut dan blok pejabat itu akan dipegang sebagai pelaburan jangka panjang. Ituadalah sebab kenapa kemasukan tanah berkenaan dibuat di bawah tajuk utama 'aset tetap' dan bukan 'aset semasa' atau 'stok barang'. Ia mungkin satu istilah yang salah tetapi fakta adalah tetap yang bahawa tanah berkenaan sememangnya dipegang untuk tujuan pelaburan (lihat perenggan 51).

(8) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Pesuruhjaya Khas telah silap dalam mencuba meletakkan tanah berkenaan di bawah mana-mana tajuk atau butiran di dalam akaun. Ini bukanlah tugas Pesuruhjaya Khas. Tugas Pesuruhjaya Khas ialah memutuskan sama ada cacatan yang dibuat adalah seperti yang dikatakan dan bukan untuk cuba membaikinya. Ianya adalah untuk Pesuruhjaya Khas memutuskan sama ada tanah berkenaan adalah 'aset tetap' sebagaimana yang dikatakan oleh perayu atau sebaliknya (lihat perenggan 53).

(9) (oleh **Mokhtar Sidin HMR**, **Abdul Aziz HMR** bersetuju) Ianya tidak membuat sebarang perbezaan sama ada perayu menjual kesemua Tanah berkenaan atau sebahagian darinya. Apa-apa pun ianya merupakan penjualan asset modal (lihat perenggan 58).

(10) (oleh **Abdul Aziz HMR**) Kenyataan Pengerusi bukanlah kenyataan perayu tetapi ianya datang dari satu pihak sementara menunggu pemerolehan 50% kepentingan di dalam perayu, belum lagi memperolehnya, jadi niat yang dikatakan oleh Pengerusi itu tidak boleh diterima sebagai bukti niat perayu. Keputusan *Waylee Investment Ltd v Commissioner of Inland Revenue* [1990] STC 780 tidak terpakai di dalam kes semasa kerana perayu tidak di bawah kawalan eksklusif Hoklian Developments Sdn Bhd atau Hoklian Holdings Bhd dan bukan anak syarikat penuhnya (lihat perenggan 75).

(11) (oleh **Abdul Aziz HMR**) Walaupun jangka masa pegangan yang pendek mungkin memberi tanda yang positif tujuan urus niaga, tetapi tidak semestinya jangka masa pegangan yang lama adalah tanda positif niat untuk melabur (lihat perenggan 82).]

Notes

For cases on appeal against assessment, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2063–2067.

For cases on income tax on land, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2243–2246.

Cases referred to

American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue [1979] 1 MLJ 1 (refd)

Bukit Yew Sdn Bhd v Director-General of Inland Revenue [1987] 2 MLJ 379 (refd)

Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 MLJ 415 (refd)

Edwards v Bairstow and Harrison [1956] AC 14 (refd)

I Investment Ltd v Comptroller-General of Inland Revenue [1975] 2 MLJ 208 (refd)

International Investment Ltd v Comptroller-General of Inland Revenue [1979] 1 MLJ 4 (refd)

Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri [1994] 2 MLJ 713 (refd)

NYF Realty Sdn Bhd v Comptroller of Inland Revenue [1974] 1 MLJ 182 (refd)

Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] STC 350 (refd)

Waylee Investment Ltd v Commissioner of Inland Revenue [1990] STC 780 (refd)

West v Phillips (1958) 38 TC 203 (refd)

Legislation referred to

Companies Act 1965
Housing (Financial Provisions) Act 1933
Income Tax Act 1967 s 4(a), (d)
Income Tax Act 1979
Income Tax Ordinance 1947 s 10(1)(a)
National Land Code 1965 s 259

Appeal from: Tax Appeal No R1–14–13 of 1995 (Hight Court, Kuala Lumpur)

Goh Ka Im (Elaine Lee Pei Sze with her) (Shearn Delamore & Co) for the appellants.

Hazlina Hussain (Normareza Mat Rejab with her) (Inland Revenue Department) for the respondent.

Mokhtar Sidin JCA (delivering majority judgment):

[1] In this case the appellant is a company incorporated under the Companies Act 1965. On 28 March 1980 the appellant purchased the following pieces of land for the sum of RM6,100,000:

Land Title	Lot No	Land Areas (sq ft)
GT 2047 (New Land Title GT 9344)	43	
GT 2048 (New Land Title GT 9345)	44	
GT 2049 (New Land Title GT 9346)	45	101,004.75
GT 2050 (New Land Title GT 9347)	46	
GT 9348	54	
GT 16200	74	89,243.55
GT 16201	84	190,248.30

[2] On 20 August 1982, the appellant obtained approval from the Kuala Lumpur City Hall to build a 31-storey office block on the land. In the Annual Report dated 4 June 1983, the chairman of Hoklian Holdings Sdn Bhd, which has through its wholly-owned subsidiary company 50% equity participation in the appellant's company said:

> The company has also through its wholly-owned subsidiary, Hoklian Development Sdn Bhd, entered into a joint-venture with Koperasi Jaya Diri Malaysia Bhd on a 50–50 basis, to acquire the entire issued capital of ALF Properties Sdn Bhd for $41.25 million. The agreement for the said acquisition has been signed with the shareholders of ALF Properties Sdn Bhd recently. ALF Properties Sdn Bhd owns a piece of land exceeding 190,000 sq ft at the junction of Jalan Ampang and Jalan Yap Kwan Seng, Kuala Lumpur. Plans are being made to develop the said land into an office complex for rental. The board foresees the prevailing good demand for office space in Kuala Lumpur will enable the company to enjoy very good rental income.

[3] It was not disputed that at the time when the statement was made, the maker of the statement had not acquired any interest in the appellant's company. It was also not disputed that at that time the appellant and Hoklian Holdings Bhd were two separate legal entities. Out of the total 190,000 sq ft of the appellant's land only 101,004.75 sq ft was required and approved for the purpose of the proposed 31-storey office block building. Sometime after 20 August 1982 but before 23 April 1985 a new management took over the appellant's company. The original plans of the proposed 31-storey office block building which were approved on 20 August 1982, were amended by the new management to one of a 30-storey office block building. The amended plans were approved vide development order dated 24 April 1985. It was also not disputed that

before the plans were drawn out, the appellant had incurred fees in drawing the development and building plans and testing the soil which the appellant called 'development expenditure'. This development expenditure also included compensation paid to squatters and clearing of site. At the material time the total development expenditure was RM1.44 million. It was in evidence and not disputed that from 1987 to 1990 part of the land was rented out and the income was charged to tax and assessed by the Inland Revenue Department as rental income under s 4(d) of the Income Tax Act 1967. On 26 July 1990, the appellant entered into a sale and purchase agreement to sell a portion of the land which was not included in the development plan to Chanrai Investment Corporation for a total consideration of RM42,500,000. By Notices of Assessment dated 9 July 1992, the respondent (the Inland Revenue Department) raised additional assessments for Years of Assessment 1988, 1989, 1990 and 1991 as follows:

Year of Assessment	Amount of Tax
1998	758.75
1989	5,704.80
1990	7,464.60
1991	13,185,916.09

[4] The appellant, being unhappy with the additional assessments appealed to the Special Commissioners of Income Tax (Special Commissioners). The appellant raised the following issues before the Special Commissioners:

(i) The gain from the disposal of the subject land was not assessable to income tax under s 4(a) of the Income Tax Act 1967 being proceeds from the disposal of a capital asset. Originally at the time of purchase of the land it was intended for long-term investment and not with the intention of trading as reflected by:

(a) revaluation of the subject land as disclosed in the appellants' audited accounts for the year ended 31 December 1980;

(b) disclosures in the accounts that the revalued land and related development expenditure was consistently shown in the appellants' balance sheet as 'Land & Development Expenditure' immediately after the heading of 'Fixed Assets' and not classified as inventories under 'Current Assets' in accordance with Approval Accounting Standard 5 as adopted by the Council for the Malaysian Institute of Accountants and Technical Bulletin 2;

(c) public statements made by the chairman of Hoklian Holdings Sdn Bhd regarding the intention of the acquisition of the land;

(d) After the purchase of the land, the appellant had incurred development expenditure. The activities carried out in relation to the land are consistent with the original intention.

(ii) The fact that the land was valued at RM54,500,000 on 6 April 1993 and the land was not sold by the appellants shows that the land was acquired with a view not for resale in the short term.

(iii) The appellants had not commenced any business (trading) in land till the date of the sale of the subject land shows that the appellants were principally engaged in property development. The appellants were a company developing its property to derive rental income.

(iv) Prior to the disposal the subject land was leased out to derive rental income which was assessed by the Inland Revenue Department as rental for years of assessment 1988 to 1991 under s 4(d) of the Income Tax Act 1967.

(v) There was no change of intention from investment to trade from the time of acquisition to the time of disposal of the subject land. The disposal was merely to realize an investment. It was not a sale conducted in the course of trade as the subject land was not acquired as stock-in-trade. The appellants had not acquired any other land since 1980 and had not carried out any transaction in land from the year 1980 to the year 1989.

(vi) The appellants had to shelf the plans to develop the land for commercial and residential use due to the recession in the country.

(vii) Proceeds from the disposal of the subject land were kept in fixed deposits and for repayment of a loan to shareholders. The appellants did not change its intention to derive income from investments as the sale proceeds were used to earn substantial interest from fixed deposits which is another form of investment.

(viii) Another issue, the appellants are entitled to the deductions of the expenditure paid for quit rent and assessment. Section 33(1) of the Income Tax Act 1967 prescribes that revenue expenditure is deductible from the gross income of a taxpayer from a source if that expenditure is wholly and exclusively incurred in the production of that gross income. Since quit rent and assessment paid on the land are revenue expenditure and are incurred wholly and exclusively in the production of gross income they are allowable as deductions against the gross rental income for years of assessment 1988 to 1990.

[5] Before the Special Commissioners, the respondent contended the following:

(i) The subject land was classified as development property in the appellants' accounts. Thus, it was no more a fixed asset.

(ii) The appellants' accounts do not show that the subject land was an investment.

(iii) In the appellants' trading, profit and loss account for the year ended 31 December 1990, the gains from the disposal of the subject land has been treated as profit.

(iv) The gains from the disposal of the subject land is chargeable to income tax under s 4(a) of the Income Tax Act 1967 which stipulates that such gains or profit are taxable as it is an adventure in the nature of trade. This is evidenced by the fact that three valuation reports were made. This shows that the appellants had made efforts to sell the property. All these activities are very commercial in nature.

(v) In the appellants' letter of 17 March 1987 to the Director General of Inland Revenue, it is stated that 'the management is still exploring the various options to deal with the property'. The property was sold in 1990. There was no evidence to show that it was recession period.

(vi) On the last issue, the quit rent and assessment paid or land can be allowed as deduction if the relevant documents are submitted.

[6] The last issue was not an issue at all because it was conceded by the respondent that deductions should be allowed if the appellant was able to submit documentary evidence in respect of them. The main issue raised by the appellant before the Special Commissioners, the High Court and before us is whether the disposal of a portion of the land to Chanrai Investment Corporation Bhd was a disposal of a capital asset or was it a disposal of stock-in-trade.

[7] The Special Commissioners should be commended in stating at great length and citing the relevant authorities in respect of the principles of trading and there is no necessity for me to repeat them. The Special Commissioners came to the following conclusion:

> In the light of the foregoing the appellants have failed to discharge the onus on them to establish that the assessment is excessive or erroneous as required by para 13 of sch 5 of the Income Tax Act 1967. They are required to show not only that the assessment is wrong but also what must be done to put it right (see *ABC v The Comptroller of Income Tax, Singapore* [1959] MLJ 162). As Edgar Joseph Jr SCJ said in *Lower Perak Co-operative Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713 at p 73:
>
> > … in an appeal by a taxpayer to the Special Commissioners against an assessment made under the Act, the assessment stands unless the taxpayer is able to satisfy the Special Commissioners that the assessment is overcharged. It follows, that in such an appeal the onus is on the taxpayer to demonstrate that the assessment should not have been made (see *Norman v Golden* 26 TC 293, per Macnaghten J at p 295) and so, the assessment stands unless and until the taxpayer satisfies the commissioners that it is wrong (per Lord Greene at p 295).
>
> In the circumstances of this case the onus is on them to show that the subject land was held as an investment by them and that the gains derived from its disposal was realisation of an investment which they have failed to do. It is the appellants' duty to satisfy us on the facts and it is entirely their fault if this case was not presented in the way it should have been (see *Farrard v Satterweithe* 14 TC 472; *CEC v Comptroller of Income Tax* [1971] 2 MLJ 43). Accordingly, we held that the gains from the disposal of the subject land is assessable to income tax under s 4(a) of the Income Tax Act 1967.

[8] Being dissatisfied with that decision, the appellant appealed to the High Court. The learned judge of the High Court affirmed the decision of the

Special Commissioners. Except for stating that the Special Commissioners came to the correct conclusion, I could not find anywhere to show that he had examined the case stated in detail to determine whether the Special Commissioners' conclusion was supported by evidence.

[9] Before us, the appellant contended that the Special Commissioners were in error in coming to the above conclusion because the evidence did not support the conclusion of the Special Commissioners.

[10] In the case stated the Special Commissioners have dealt at great length in respect of trading under the revenue law. Some thirty authorities were cited by the Special Commissioners and I have no quarrel with the principles stated by them in particular as to the burden of proof. It is accepted that the onus is always on the taxpayer to show that the income is not assessable to income tax. The burden is on the appellant to prove that the sale of the portion of the subject land was a capital realization and not trading assessable to tax under s4(a) of the Income Tax Act 1967 (hereinafter referred to as 'the Act'). The Special Commissioners have found that the income from the sale was trading income and thus assessable to tax under s 4(a) of the Act. The Revenue contended that this was a finding of facts by the Special Commissioners which the court should not disturb. This is the first issue I have to deal with.

I WHETHER THE COURT CAN INTERFERE WITH THE FINDING OF THE SPECIAL COMMISSIONERS

[11] This principle was enunciated by Lord Radcliffe in *Edwards v Bairstow and Harrison* [1956] AC 14. There is no necessity for me to look into that authority itself because our courts have referred to it time and again and also given it the Malaysian flavour. One of them is *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713. At pp 732–734, Edgar Joseph Jr SCJ (as he then was) stated:

THE DUTY OF THE COURT WHEN HEARING APPEALS FROM THE SPECIAL COMMISSIONERS

> First of all, it would be pertinent to say that in considering this appeal we have kept in the forefront of our minds the much-quoted principles enunciated by Lord Radcliffe in *Edwards v Bairstow and Harrison*, regarding the duty of the court when hearing appeals from commissioners in tax cases. It will be recalled that in that case what Lort Radcliffe said (at pp 35–36) was this:
>
> > I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them.

A When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything *exfacie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing *exfacie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same text. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

In *Chua Lip Kong v Director-General of Inland Revenue*, Lord Diplock when delivering the unanimous judgment of the Privy Council in a tax appeal had occasion to refer, with approval, to the observations of Lord Radcliffe aforesaid in the following terms:

> … it is plainly wrong in law; or else it is a conclusion of mixed fact and law that no reasonable special commissioners could have reached if they had correctly directed themselves in law. Whichever way it is looked at, it falls within the well-known principle laid down by Viscount Radcliffe in *Edwards v Bairstow*. Itis a conclusion or decision of the special commissioners which the High Court was entitled to and ought to have set aside.

And, in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue*, when delivering the unanimous judgment of the Privy Council, Lord Oliver indicated in what circumstances a court might interfere with the decision of the special commissioners. Here is what his Lordship said (at p 169):

> The special commissioners are, of course, as the Federal Court rightly observed, the judges of fact, but in finding the facts and drawing inferences of secondary fact from them, they must not misdirect themselves and they must draw conclusions from facts having probative value. In their Lordships' judgment, the special commissioners in this case both misdirected themselves by reaching conclusions inconsistent with primary facts found by them and drew inferences from matters which were of no probative value in supporting their conclusions.

In *Commissioners of Inland Revenue v Fraser*, Lord President Normand said this (at p 501):

> Then the commissioners, on consideration of the facts and arguments submitted to them, decided by a majority that an adventure in the nature of trade had not been carried on; that an investment had been made and subsequently realized

and that the profit was not assessable to income tax. It is obvious from the way in which the commissioners have stated their conclusion that they were quite aware that they were not stating something in the nature of a primary fact but were stating a conclusion into which argument upon the construction of the Income Tax Act had entered. The respondent's counsel maintained, however, that that finding was a finding in fact and, as such, was not reviewable by this court. I think we have jurisdiction to entertain the question at law, which is whether the majority of the commissioners were warranted on the evidence in determining as they did. At the narrowest it is always open to this court in a stated case to review a finding in fact on the ground that there is no evidence to support it. That has been stated again and again.

THE ONUS ON THE TAXPAYER

We recognise that in an appeal by a taxpayer to the special commissioners against an assessment made under the Act, the assessment stands unless the taxpayer is able to satisfy the special commissioners that the assessment is overcharged. It follows, that in such an appeal the onus is on the taxpayer to demonstrate that the assessment should not have been made (see *Normand* v *Golder*, per Macnaghten J at p 295) and so, the assessment stands unless and until the taxpayer satisfies the commissioners that it is wrong (per Lord Greene at p 295). The taxpayer, therefore, undertakes the same onus when he brings a further appeal to the High Court and yet another appeal to this court.

II WHETHER THE SPECIAL COMMISSIONERS HAVE COME TO THE RIGHT CONCLUSION

[12] In the present appeal, I find that the Special Commissioners in upholding the assessments by the Revenue relied essentially on two grounds: (1) the objects of the appellant; and (2) how the appellant treated the property in its account.

(1) The objects of the appellant

[13] The Special Commissioners in this case cited the following as the main objects of the appellant as found in the Memorandum and Articles of Association of the appellant:

(i) To carry on the business of property developers and building contractors to erect and construct houses, buildings or works of every description on any land of the company, or upon any other lands or property and to pull down, rebuild, enlarge, alter and improve existing houses, buildings, or works thereon to convert and appropriate any such land into and for roads, streets, squares, gardens and pleasure grounds and other conveniences and generally to deal with and improve the property of the company.

(ii) To purchase, lease or otherwise acquire for development, investment or own use lands, houses, theatres, buildings, plantations and immoveable property of any description or any interest herein.

(iii) To sell, lease, let, mortgage, grant rights over or otherwise dispose of the lands, houses, buildings and other property of the Company for cash or for shares or otherwise and upon any terms and conditions thought desirable.'

[14] In the case stated the Special Commissioners stated as follows:

> The intention of the appellants must be judged against the background of their acts and conduct and the circumstances of the case. The question whether a profit realised on the sale of real estate is a realisation or change of investment or an act done in the carrying on of a business is to be determined in the light of the facts in each case …
>
> …
>
> For the purpose of ascertaining the object and intention with which a limited liability company makes a particular purchase, it is permissible to look at the objects of the company as described in its constitution in the memorandum of association. …

[15] The objects as stated in the Memorandum and Articles of Association of a company by themselves are not conclusive. This has been stated again and again by the court in various authorities. The objects of the company as stated in the Memorandum and Articles of Association of the company permit the carrying out of the objects stated therein but the company is not obliged to carry out those objects and it is virtually not possible for the company to carry out all the objects as stated in its Memorandum and Articles of Association.

[16] It is not safe for the Special Commissioners to come to the conclusion that the appellant's principal activity is dealing in property merely on the ground that it is one of the stated objects of the appellant as found in its Memorandum and Articles of Association. To come to a safe conclusion one has to go into the activities of the appellant whether in the past or in the present to find out whether the activities are one of the stated objects of the appellant. In *Bukit Yew Sdn Bhd v Director-General of Inland Revenue* [1987] 2 MLJ 379, Harun J (as he then was) in his observation of the objects of a company in the Memorandum of Association at p 381 stated:

> Memorandum of Association
>
> The Special Commissioners appear to have placed undue reliance on cl 3 of the Memorandum of Association of the appellant viz:
>
> 3(1) To purchase take on lease or in exchange or otherwise acquire any lands and buildings in the States of Malaya or elsewhere and any estate or interest in and any rights connected with any such lands and buildings.
>
> (2) To develop and turn to account land acquired by the company or in which the company is interested and in particular by laying out and preparing the same for building purposes constructing altering pulling

> down decorating maintaining furnishing fitting up and improving buildings and by planning paving draining farming cultivating letting on building lease or building agreement and by advancing money to and entering into contracts and arrangements of all kinds with builders tenants purchasers and others.

The proposed objects of a company are relevant when considering the transactions in which the company is found to have been engaged. It does not, however, follow that just because the company has powers to do certain things, anything done by the company must necessarily be carrying on the business of the professed objects of the company: see the *Land Revenue Commissioners v Westleigh Estates Co.* Indeed, a company actively engaged in trade is also entitled to hold investments, so that one must distinguish investment from stock-in-trade: *Simmons v IRC.* A good illustration of the distinction between investment and trading is to be found in *Phillips v West* where it was held that whilst the 287 properties which the appellant built with the intention of selling ultimately were stock-in-trade of the business of builder, the 2,208 houses built to let were investments and any surplus arising from their sale was therefore not liable to tax; and that the appellant was not carrying on the business of property dealing.

[17] In *American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue* [1979] 1 MLJ 1, Lord Diplock in respect of the objects set out in the Memorandum of Association stated at p 3:

> On the question special to the instant case, viz whether the company in 1968 and 1970 was carrying on a business of letting out its premises for rents, the Special Commissioners were of opinion that it was. The question is one of fact, and in the High Court Hashim Yeop A Sani J treated this expression of opinion as a finding of fact by the Commissioners which he should not disturb. Closer analysis of the Stated case, however, discloses that the opinion expressed by the Special Commissioners was not a finding of fact but a conclusion of law. They accepted the company's submission that because the letting of its property was one of the objects set out in its Memorandum of Association this was in law conclusive that in making any letting of its premises it was carrying on a business.
>
> So stated this is, in their Lordships' view, too broad a proposition. It derives apparent support from an observation of Pollock MR in *Inland Revenue Commissioners* v *Westleigh Estates Co* where he said:
>
> > If (a company's) objects are business objects and are in fact carried out it … carries on business.
>
> This, however, was said in the context of a company which was carrying out one of the principal objects stated in its Memorandum. Their Lordships would not endorse the view that every isolated act of a kind that is authorized by the Memorandum if done by a company necessarily constitutes the carrying on of a business.
>
> …

A As has been mentioned, the question whether the company were carrying on a business of letting out their premises for rent was one of fact for the Special Commissioners: but it is one to which they did not apply their minds because of their mistake of law as to the effect of the presence in the company's Memorandum of power to let their premises or any part thereof…

B **[18]** The Special Commissioners relied heavily on the decision in *I Investment Ltd v Comptroller-General of Inland Revenue* [1975] 2 MLJ 208 where Raja Azlan FCJ (as His Highness then was) stated as follows:

C Now what is the business of the appellant company? I think it is important first to look at the nature and purpose of the company as expressed in the Memorandum of Association and have regard to them as an item of evidence when answering this question.

D It seems to me that it is contemplated that the essential nature of its business is a business of doing what is necessary to carry out the objects which it elects to carry out. That is what it speaks of itself as its business. *Indeed, 'dealing in immovable property and land development' was the business of the appellant company as admitted by its secretary in his reply to the query raised by the respondent. This admission, which was mentioned in the grounds of decision as a matter of importance, is evidence against the appellant company and it must be noted that this admission was made long before the dispute relating to the new assessment arose.* The relative weight to be attached to this piece of evidence was no doubt a

E matter essentially for the Special Commissioners.

F There are in all 30 objects incorporated in the Memorandum of Association, *inter alia*, power to traffic and otherwise deal in or turn to account buildings and immovable property of any description (cl 3(i)), to develop and turn to account any land acquired and preparing same for building purposes (cl 3(ii)), and to invest and to hold shares securities or investments or to sell realize and deal with the same and to re-invest the proceeds (cl 3(xvi)). It also has power to carry on various kinds of business ranging from rubber planting to importing and exporting of watches and photographic goods (cl 3(v)).

G Now I agree that those are only objects, and although the appellant company may do those things, it is not obliged to do them; and, in fact, reading the Memorandum of Association, it would be impossible for it to carry out all the objects which it is empowered to carry out by the Memorandum of Association.

H What happened was this. The appellant company was formed in January 1962, intending to do business on a very wide scale. Its financial position was not that sound, so it took a large bank overdraft of $491,365.44 from Malayan Banking. Itpaid $337,273.71 to purchase lands at Penang Road, on which it entered into contracts to put up a six-storey building with a shopping arcade and hotel ('the property'). The said building was to be completed by 30 October 1963 at a cost of $585,000. When the ground, first and second floors were completed, they were

I leased out to tenants. In June 1962, there was an offer to rent out the hotel rooms, but the negotiations fell through. In October 1963, the business and undertaking of the company was reconstructed with a view, it was alleged, to expand its business

of investment in securities. In pursuance of these new objects, it transferred the property, which was still in the process of completion, to Island Hotels and Properties (Malaysia) Ltd and undertook to complete the building in exchange for 3¾ million shares of $1 each in the latter company all credited as being fully paid.

The appellant company acquired no other land. But in 1962 it held shares worth $175,000 in four other companies. In 1963 it received $7,044 by way of rent of the arcade. In that year also it incurred a loan of $422,500 from Disco Ltd. By December 1963 and January, 1964 it had not only transferred away all the shares in the four companies to other person or persons unknown, but also all the Island Hotels shares to Disco Ltd (2¼ million shares) and Tan Sim Hoe (1½ million shares), two distinct legal persona. The appellant company was still a going concern. In 1965 there was a large bank overdraft of $101,575.11 cts.

From the exchange, the appellant company made a profit of $1,704,061 worth of shares. The respondent considered this amount as income from business carried on by the appellant company and therefore made an additional assessment on that amount. The respondent also assessed the sum of $7,044 as being the gross amount of rentals received from the arcade. In arriving at the income of $7,044, the respondent had not made any deduction from the gross amount of rentals in respect of interests on overdrafts taken to finance the construction of the said building, on the ground that to allow such deduction would mean allowing more than one deduction of the said expense.

…

I think it right to emphasise what has already been treated judicially that cases on income tax depend so much on their peculiar facts that excessive reliance on precedents may be dangerous. Whether the appellant company was carrying on business of trafficking in immovable property must, in the last analysis, depend on all the surrounding circumstances, so that no single criterion can be formulated.

…

In my opinion, the form which a company takes is no criterion in determining the question whether it was carrying on business. To ascertain the business of a limited company, one must look at what business it actually carries on and not what business it professes to carry on. The Memorandum of Association affords information as to the object of the company. The acid test is to look at the nature and purpose and the substance of the transaction in question as expressed in its Memorandum of Association and, in doing so, one may go behind technicalities. As a general rule, the mere setting up of a company points to its business intention because of its implied continuity. That would be a strong presumption that it intends to do business.

…

It has been said more than once that when we come to deal with income tax cases we must look at all the surrounding circumstances, not for the purpose of considering what one's own conclusion might be, but for the purpose of seeing, in

A fact, whether there is evidence both ways — whether there is evidence upon which the Special Commissioners could arrive at their conclusion. Keeping in view what the appellant company in fact did, the purpose for which it came into existence and the objects which were prescribed in the Memorandum of Association and the whole of the other circumstances which I have briefly summarised, it seems to me that those were extensive series of dealings in immovable property over a period, and using for the purpose an organisation and methods such as are ordinarily adopted by property developers. When we look at all those circumstances, it is not possible to say that they do not constitute evidence upon which a tribunal of primary fact might arrive at a conclusion that it was carrying on business in immovable property …. (Emphasis added.)

[19] As pointed out earlier, carrying on business in immovable property is one of the objects of the appellant. There is another object of the appellant as found in the Memorandum and Articles of Association which, in my view, is equally important, ie investment in property etc. Purchasing of immovable property by itself could not be said to be the sole object of the appellant because there is another object of the appellant in respect of land, that is investment in land. These two objects are so closely related that one has to examine the whole transaction before one can come to a correct conclusion whether that activity constitutes business or dealing in land or whether it is an investment.

[20] In order to come to the correct conclusion we have to see what was the intention of the appellant when they purchased the subject land; whether the property was to be kept for long-term investment or whether it was purchased and to be resold at a profit as soon as possible or to be developed and to be sold in the developed form and made profit from the transaction. It is not disputed that a property kept for investment would eventually be sold but the profit realised from the sale would be capital realisation and not subject to tax. From the authorities it is clear that a property kept for some time from the time it was purchased would be considered as an investment and not business dealing in land. The authorities also show that a property purchased and sold soon after would not be considered as a dealing in land when there is no evidence to show that preparation being made for the sale.

[21] In *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri*, the appellant purchased land in 1956 with the primary object of building houses thereon and selling them to its members in order to achieve its objective of enabling its members to own houses. The appellant subdivided the land and, in 1968, entered into several agreements with a housing developer, whereby the developer bought a portion of the subdivided land and was obliged to sell the lots to the appellant's members at the same price. The appellant agreed to bear the cost of the infrastructure for the lots. Demand for the houses was not good and 41 out of 101 lots were left unsold. In order to cut its losses, the appellant was forced to sell the remainder of the land to the developer and to release it from its obligation to sell the remaining 41 lots to

the appellant's members. In return, the appellant was released from its obligation to construct the infrastructure. In assessing the appellant's income, the revenue included the profits received from the disposal of the land which the Revenue claimed to be gains from trading and therefore assessable to tax under the Act and the Supplementary Income Tax Act 1967. The revenue considered that the value of the lots as stock-in-trade should be based on the cost in 1956, when the appellant acquired the land. The appellant's appeal to the Special Commissioners was dismissed. The appellant's reference to the High Court by way of case stated was also dismissed. The appellant then appealed to the Supreme Court which allowed the appeal. The Supreme Court held that the nature of the transaction must be determined from the point of view of the appellant and a mere sale at a profit is not by itself a trading activity.

[22] Delivering the judgment of the court, Edgar Joseph Jr SCJ (as he then was) stated at pp 734–735:

> It is unnecessary to discuss the evidence at any length and, it will suffice, if we say, that the special commissioners finding of fact that the taxpayer's primary object in the purchase of the land was to develop it, build houses thereon and sell them to its members, was amply justified by the evidence and, indeed, was unassailable.
>
> The special commissioners had made it unmistakably clear in their case stated that at the time of the purchase of the land the aim of the taxpayer was to build houses for its members. In so holding, the special commissioners had drawn an inference from a scrutiny of the taxpayer's by laws.
>
> True it is that the by laws are not conclusive of a society's intention as much as the memorandum of association is not conclusive of the intention of a company. (See *Scottish Australian Mining Co Ltd v Commissioner of Taxation*). But, when as here, the principal objects of the taxpayer are implemented, as indeed had been found by the special commissioners (see finding (vii)) then this, of course, supports the contention of the taxpayer that it had no intention to trade at the time of acquisition of the asset. To put it another way, it supports the contention of the taxpayer that it had no intention, at the time of the acquisition of the asset, of disposing of it at a profit, but rather that the asset was acquired as a permanent investment. In support of this contention, the following passage in the judgment of Lord Wilberforce in the House of Lords case of *Simmons (as liquidator of Lionel Simmons Properties Ltd) v IRC* at p 800 was cited:
>
> > One must ask, first, what the commissioners were required or entitled to find. Trading requires an intention to trade; normally the question to be asked is *whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment?* Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. (Emphasis added.)

Clearly, therefore, the special commissioners having found as fact that the primary purpose of the taxpayer in acquiring the land in February 1956 was to build houses for members, that is to say, for a domestic purpose, through co-operative efforts, a finding — we would interpolate to repeat — which was amply justified by the evidence, then went to misdirect themselves by making the wholly inconsistent finding that the acquisition of the land had never been treated or held as an investment and that, on the contrary, it had been held as stock-in-trade.

[23] Further down at pp 737–740 his Lordship stated:

DOES SUB-DIVISION OF LAND SIGNIFY TRADING?

At this point, it would be convenient if we turn to consider the topic of sub-division. It is obvious that sub-division of land does not *per se* signify trading. It is necessary to enquire what was the purpose of the sub-division. It goes without saying, that if the sub-division was done for the purpose of rendering land more saleable for the purpose of trading then he who does so, does so not as owner but as a land speculator. By the same token, if the sub-division was done in furtherance of a co-operative society's aim of pooling its financial resources of all its members and, with it, to purchase a plot of land with a view to satisfying their domestic need to each having a roof over his head, then this would not necessarily signify a badge of trading.

In the *Scottish Australian Mining Co* case, a company had been formed not for the purpose of profit but primarily for mining. In the course of winding up its mining operations, it embarked upon sub-division and sale of sub-divided lots. It was held that the sub-division and sale of the sub-divided lots did not constitute stock-in-trade but the realization of a capital asset.

In *Hudson's Bay Co Ltd* v *Steven*, Farwell LJ said at p 437 that:

> A land owner may lay out part of his estate with roads and sewers and sell it in lots for building, that he does this as an owner, not as a land speculator … It would be different if a land owner, an individual, entered into the business of buying and developing and selling land; but the case of the owner, whether of land, or pictures, or jewels, selling his own property, although he may have expended money on them in getting them up for sale, is entirely different; he sells as owner, not as trader.

So, we must ask ourselves whether regard being had to the facts and circumstances proved or admitted in this case, the inference drawn by the special commissioners, that the relevant transactions entered into by the taxpayer with the developer were an adventure or concern in the nature of trade was justified.

In other words, before us, the broad question of decision, is whether on the facts found by the special commissioners, they were entitled to arrive at the decision at which they did. Such a question, as the authorities cited plainly show, raises a point of law and is within our jurisdiction to entertain in an appeal by way of case stated.

THE GUIDING PRINCIPLES

Before embarking upon a consideration of the specific question of critical substance aforesaid, there are certain well-established principles which need to be kept in the forefront of our minds and they are as follows:

The form of the documentation and the terms thereof

Generally, when considering the question whether a particular transaction to which a taxpayer is a party constitutes a trading transaction, the court would, first of all, have to consider, objectively, whether the transaction has the outward appearance of trading transactions or, in other words, whether the documents and terms thereof were normal when compared to transactions of the like kind in the commercial world and carried out in a similar way. (See *IRC v Livingstone* per Lord Clyde at p 542).

Paramount object of transaction: does it have a commercial purpose?

In *Lupton* v *FA & AB Ltd* at p 660C, Lord Glaisdale' statement that if the appearance of the transaction leaves the matter in doubt, an examination of its *paramount object* will always be relevant and will generally be decisive, indicates that there can be cases where despite the commercial features of a transaction, if its object is fiscal, then that would be decisive. This means that the prospect of profit is not conclusive.

Secondly, even if a transaction has all the attributes of trade it must still have a commercial purpose. (See, eg *Lupton v FA & AB Ltd*; *Coates* v *Arndale Properties Ltd* at p 1333; *Overseas Containers (Finance) Ltd v Stoker* at p 613).

Subjective intention and motive of the parties

In determining the question whether a transaction has a commercial purpose or object, the subjective intention of the parties to it may be material; it would be material if the transaction is ambiguous or, in other words, its purpose were open to two interpretations, namely, a commercial purpose or a non-commercial purpose. When the subjective intention of the parties becomes a relevant factor, the motives of the parties may be most material. We need hardly add that there is a fundamental difference between intention and motive; intention means seeking to do something and is connected to purpose or object whereas motive is concerned with the reason for doing something.

It has been said that motive may be the considerable importance in borderline cases.

In *Iswera v IRC*, a taxpayer had wished to reside near the school which her daughters were attending and with this in mind she had bought a 2½ acre plot which she had sub-divided into 12 building lots, nine of which she had sold to nine sub-purchasers, keeping one for her house and two for reconveyance to the vendor. The question for determination was whether on the facts the inference that the transaction was an adventure or concern in the nature of trade was justified. Speaking for the Judicial Committee of the Privy Council, Lord Reid said this at p 668:

> If … the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances.
>
> In the present case not only has it been held that the appellant's dominant motive was to make a profit, but her actions are suggestive of trading as regards the greater part of the site which she bought. She had to and did make arrangements for its sub-division and immediate sale to the nine sub-purchasers before she could carry out her contract with the vendor of the site.

The intention, and consequently the motive of the taxpayer, can be relevant to the question of trade or investment where the transaction is ambiguous, as for example, the purchase and sale of assets which are capable of being investments. (See *Simmons (as liquidator of Lionel Simmons Properties Ltd) v IRC*).

In *Religious Tract and Book Society of Scotland v Forbes*, the society had been established for the distribution of religious literature, sent out colporteurs who sold Bibles and acted as cottage missionaries. The colporteurs would travel selling their wares from door to door for the purpose of administering religious advice to customers with a view to spreading the Gospel. The society also sold Bibles at a shop; the shop showed a profit, but the colportage a loss. The colporteurs would appear to have carried on a business by sale and purchase. Nevertheless, it was held that the selling of the Bibles did not constitute trading since the object of the colporteur was missionary work by engaging the customer in religious discussion with a view to spreading the Gospel and so the loss could not be set off against the profits.

[24] At pages 741–744 his Lordship went on to state:

DID THE RELEVANT TRANSACTIONS HAVE A COMMERCIAL PURPOSE?

The next question we must consider, having regard to the authorities cited is whether the relevant transactions entered into by the parties had a commercial purpose or object *from the taxpayer's point of view* as opposed to that of the developer, and this would make the taxpayer's intention and therefore its motive relevant. Non-commercial motivation may so affect the nature of trading transactions that they cease to be normal trading transactions. (See *Religious Tract and Book Society of Scotland v Forbes*).

It is obvious that a mere sale at a profit is not a trading activity.

Indeed, we consider that it would be wrong to assume that in every case where a landowner enters into a transaction with a housing developer, the landowner would be embarking on an adventure in the nature of trade. We are supported in this by the following passage in the judgment of Russel LJ speaking in the Court of Appeal in *Taylor v Good* at p 154h–j:

> All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps *to enhance the value* of the property *in the eyes of a developer* who might wish to buy for development. (Emphasis added.)

Taylor v Good, was followed in *Rand v Alberni Land Co* where a number of persons who owned land had floated a company merely as machinery to realise their interests in that land. Expenditure had been incurred by the company in clearing the land and putting in roads and procuring a railway company to bring in a line to open up the area. The court held that this was merely enhancing the value of the land and not trading.

Similarly, in the Australian case of *Scottish Australian Mining Co Ltd*, a company was held to be merely enhancing the value of its asset although it had carried out wholesale works on its land by way of sub-division of the land, the construction of roads, the preparation of site plans for schools and churches, setting aside land for schools and churches, for parks and the construction of a railway station.

So also, in the South African case of *Berea West Estates (Pty) Ltd v SIR*, although a taxpayer company with the intention of realising its land had sub-divided it, installed water and electricity, made and repaired roads and carried out surveys; this work being done to render the land more saleable, was held not to be trading.

Then, again, in considering the question whether there had been an intention to trade, a factor to which regard may be had is the nature of the subject matter in question; more particularly, whether the subject matter is *prima facie* an investment. Thus, in *Commissioners of Inland Revenue v Reinhold* at p 393, Lord Carmont said this:

> A disclosed intention not to hold what was being bought might, as Lord Dunedin said, provide an item of evidence that the buyer intended to trade and if the commodity purchased in the single transaction was not of a kind normally used for investment but for trading and if the commodity could not produce an annual return by retention in the hands of the purchaser, then the conclusion may easily be reached that the adventure was a trading one. If, however, the subject matter of the transaction is normally used for investment — land, houses, stocks and shares — the inference is not so readily to be drawn from an admitted intention in regard to a single transaction to sell on the arrival of a suitable pre-selected time or circumstances and does not warrant the same definite conclusion as regards trading or even that the transaction is in the nature of trade.

…

In the *Scottish Australian Mining Co* case, the taxpayer company had been formed 'primarily' and 'essentially' for the purpose of mining. It had purchased lands for this purpose although it did not appear to be carrying on mining for this purpose but it did carry on coal-mining on a large piece of land, 'the Lambton Freehold Estate' ('the Lambton Estate'). After the coal seam was exhausted, the taxpayer commenced to sub-divide the Lambton Estate and sell the sub-divided lots in a big way. A small portion was set aside for homes for the miners but the

rest were for commercial sale, made attractive by the building of roads, a railway and lots were sold or granted for the building of churches, schools and hospitals and the provision of parks.

William J after observing that the mining company was not formed for the purpose of trade, went on to consider, inter alia, whether the sale of the land by it constituted a trading activity. In considering this question, his Lordship asked himself the following question: 'Was the purchase made with the intention of selling at a profit? (at p 194 bottom). He concluded that the mining company was merely realizing a capital asset and not disposing of stock-in-trade. In so concluding, he made the following findings and/or enunciated the following principles:

(i) it (the land) was purchased with the intention of carrying on coal-mining, see bottom of p 194; therefore it was not trading, at p 195 middle;

(ii) sub-division of the land did not necessarily make it stock-in-trade: ' … it was land which because of its locality and size could only be sold to advantage in sub-division … ' at p 195, lower middle;

(iii) the taxpayer company was not formed for the purpose of trading, this being one of the factors to take into account; at p 192, bottom;

(iv) merely realising property is not trading; the act and purchasing and reselling must be taken into account; at p 196, middle.

And, at p 196 Williams J said this:

> A landowner may lay out part of his estate with roads and sewers and sell it in lots for buildings so that he does this as *an owner* not as a land speculator … There is also the statement of Rowlatt J … that 'in order to see clearly that the *Hudson's Bay* case (1909) 5 TC 424 for instance does not apply, there must be something in the nature of buying at any rate, and not merely selling, which is mere turning your property into money.

And, at p 252, his Lordship's statement that 'merely realising is not trading. It is no good saying that it is a trade of realising … so that in the course of carrying on a trade they have in fact done some realizing', was supported by the Privy Council in *Commissioner of Taxes* v *British Australian Wool Realisation Association Ltd* (at p 252) wherein the Privy Council said that the mere extensiveness of the organization set up to realise an asset or assets does not of itself cause the realization to become a business…

We are aware that in the later Australian case of *Commissioner of Taxation v Whitfords Beach Pty Ltd*, the decision of Williams J in the *Scottish Australian Mining Co* case was doubted by two judges of the High Court of Australia (namely, Mason and Wilson JJ). Nevertheless, the principles as opposed to the decision of Williams J in the *Scottish Australian Mining* case were affirmed by the Federal Court of Australia in *Stratham & Ors v Federal Commissioners of Taxation*.

But, more importantly, in *Lim Foo Yong Sdn Bhd*, the special commissioners had, as had the special commissioners in the present case, erred in holding that the mere acquisition and sale of an asset resulting in a profit constituted trading or an adventure in the nature of trade. Here we should like to refer to the headnote to *Lim Foo Yong Sdn Bhd* (at p 255) which reads as follows:

> The special commissioners, in spite of having found, *inter alia*, that capital had been raised to expand the hotel business, upheld the assessments. They had assumed that, since the objects of the taxpayer company enabled it to trade in land or shares, it followed inexorably that, if it had once acquired land and sold shares at a profit, it was to be labeled as a company engaged in the business of dealing in property and that all its property, for whatever purpose held, necessarily constituted trading stock, the profitable disposition of which would give rise to a trading profit.

The Privy Council stressed that what was vital was the intention of the taxpayer and whether that intention remained the same or had changed.

[25] In *Director-General of Inland Revenue v Khoo Ewe Aik Realty Sdn Bhd* [1990] 2 MLJ 415, Khoo Ewe Aik (deceased) and his wife (also deceased) were landed proprietors in Penang and Khoo Ewe Aik owned the subject land. During their lifetime they formed and incorporated a family investment company, the respondent. The respondent was empowered, *inter alia*, under the memorandum of association to engage in land investment, land development and land improvement or to purchase and then sell land so purchased or land which constituted an investment. The respondent accepted the transfer of several landed properties from Khoo Ewe Aik and his wife. The respondent was subsequently authorized to transfer the shares of Khoo Ewe Aik and his wife to his children and grandchildren. In 1977, the respondent had submitted a layout plan for the construction of housing units for a housing scheme in respect of the subject land but this was later abandoned. There was no application for the subdivision of the subject land. It appeared that from 1977 to 1979 the respondent intended to become a housing developer selling luxury holiday bungalows but from 1980 the respondent again changed its intention from being that of a housing developer to that of an investor. Subsequently, the respondent sold the subject land. The respondent was assessed to income tax on the sale of the land. On appeal to the Special Commissioners, it was decided that the disposal of the land was not an adventure in the nature of trade and the profit of the disposal was not assessable to income tax and development tax. The appeal to the High Court was dismissed and the appellant appealed to the Supreme Court. It was held that there was sufficient evidence to support the Special Commissioners' determination that the respondent's sale of the subject land did not constitute an adventure in the nature of trade and that gains or profit derived from the sale were therefore not chargeable to tax under s 4(a) of the Income Tax Act 1967. Gunn Chit Tuan SCJ (as he then was) delivering the judgment of the court stated at pp 419–420:

Now, s 4(a) of the Income Tax Act 1976, is concerned with tax which is chargeable on income in respect of gains or profits from a business, for whatever period of time carried on. The word 'business' is defined in s 2 of the said Act to include a 'profession, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment'. In this case the question was whether or not an adventure in the nature of trade was being carried on and the Special Commissioners had to consider all the circumstances of the case and their finding would be one of fact. The broader question as to the meaning of adventure in the nature of trade would however be one of law.

As for the contention of the senior federal counsel that the respondent was a trading company, there was no finding of fact by the Special Commissioners that the respondent was such a company or had traded since its incorporation in 1975. As for the Special Commissioners' finding of fact that the respondent had a change of intention from becoming a trading company back to that of an investment company, like the learned judge we were satisfied that there was evidence in this case to support the finding of the Special Commissioners.

We also did not agree with Cik Zaleha that three of the four conditions referred to in *Leeming v Jones* have been complied with as there were no findings on the evidence by the Special Commissioners that there was an organisation in existence nor were there any activities such as renovations and replacements as in the case of *Edwards v Bairstow* which led to the maturing of the asset sold. In *Edwards*' case, the machinery concerned was in fact sold in five separate lots whereas in this case there was only one isolated transaction of the sale of subject land. In *International Investment Ltd v Comptroller-General of Inland Revenue*, it is true that the Privy Council has held that a company whose business is or includes trading prima facie begins to trade as soon as it embarks upon the first transaction of a trading nature. In that case the Privy Council considered that the transaction in question constituted trading even if it was isolated. However, there was evidence in that case on which the Special Commissioners could conclude that the appellant company was carrying on a trade in immovable property and the Privy Council held that there was no justification for reversing the determination of the Special Commissioners as it has not been shown that they have misdirected themselves in law, or proceeded without sufficient evidence in law to justify that conclusion. In the present case we did not agree with Cik Zaleha that there was any evidence of the badges of trade. No doubt the respondent had power in its memorandum and articles to deal with land but there was no evidence or any finding by the Special Commissioners that the respondent had in fact traded in land. We also did not agree with the contention of the senior federal counsel that the formation of Gold Vale and other subsidiaries by the respondent in this case were activities which had led to the maturing of the asset which was sold. As stated earlier on, the learned judge had pointed out that the subject land was not sub-divided and nothing was done to it by the respondent to improve its value which merely appreciated in the course of time due to development of the surrounding area.

Here it is interesting to note the following passage in the judgment of Rowlatt J in *Thew v South Africa Co Ltd* at p 156 in which it was held that in the circumstances of that case there had been trading:

> In this case the question is whether profits which can be found in the prices realised for land sold by this company are to be included in their profits and gains for income tax purposes. That depends upon whether the profits to be found in such sales are part of the profits of a trade or concern in the nature of a trade carried on by the company.
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> For the present purpose, that is to say, for the purpose of ascertaining whether profits made upon a sale of an article are taxable profits, I think it is sufficiently accurate to say that it depends upon whether the article was acquired for the purposes of trade or not. In the case of a landowner who sells his land, or in the case of a man with valuable possessions who sells his books or pictures or plate or wine or what not, I take it that nobody dreams of taxing him upon the enhanced value which he may make when he sells these articles as compared with what he bought them for or what they were worth at the beginning of the year, if he is merely selling his possessions which he does not hold as a trader or with the view of a trader at all.
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> …
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> In this case as we were satisfied, as was the learned judge in the High Court, that there was sufficient evidence to support the Special Commissioners' determination that the respondent's sale of the subject land did not constitute an adventure in the nature of trade….

[26] In *Bukit Yew Sdn Bhd v Director-General of Inland Revenue* [1987] 2 MLJ 379, the appellant company was incorporated on 29 November 1963. On 26 February 1964, the appellant acquired a piece of land. The said land was sold on 17November 1978 (some 14 later). The appellant was assessed to real property gains tax on the gains which assessment was paid to the respondent. The respondent subsequently on 5 July 1980, raised an assessment in the sum of $179,925 in respect of the gains arising from the said property in respect of income tax. The question before the Special Commissioners and the court was whether the transaction viz the sale of the said land by the appellant constituted an adventure in the nature of trade. The Special Commissioners held that the transaction was an adventure in trade and confirmed the assessment. The appellant by way of case stated appealed to the High Court. The High Court held that the Special Commissioners was wrong. At pp 381–382, Harun J (as he then was) stated:

> Memorandum of Association
>
> The Special Commissioners appear to have placed undue reliance on cl 3 of the Memorandum of Association of the appellant viz:
>
> 3(1) To purchase take on lease or in exchange or otherwise acquire any lands and buildings in the States of Malaya or elsewhere and any estate or interest in and any rights connected with any such lands and buildings.

A (2) To develop and turn to account land acquired by the company or in which the company is interested and in particular by laying out and preparing the same for building purposes constructing altering pulling down decorating maintaining furnishing fitting up and improving buildings and by planning paving draining farming cultivating letting on building lease or building agreement and by advancing money to and entering into contracts and arrangements of all kinds with builders tenants purchasers and others.'

B

The proposed objects of a company are relevant when considering the transactions in which the company is found to have been engaged. It does not, however, follow that just because the company has powers to do certain things, anything done by the company must necessarily be carrying on the business of the professed objects of the company: see the *Land Revenue Commissioners v Westleigh Estates Co*. Indeed, a company actively engaged in trade is also entitled to hold investments, so that one must distinguish investment from stock-in-trade: *Simmons v IRC*. Agood illustration of the distinction between investment and trading is to be found in *Phillips* v *West* where it was held that whilst the 287 properties which the appellant built with the intention of selling ultimately were stock-in-trade of the business of builder, the 2,208 houses built to let were investments and any surplus arising from their sale was therefore not liable to tax; and that the appellant was not carrying on the business of property dealing.

C

D

E Intention

A good test to determine whether the property held is investment or stock-in-trade is to establish the *intention* of the appellant at the time of acquisition of the property. Why did they buy it and for what purpose. Here the Special Commissioners inferred from the facts before them that:

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(a) before World War II, the object of the Trust was to retain Bukit Yew (Lot 1305) as part of the family inheritance and for sentimental reasons'.

(b) in August 1963, it was discovered that Bukit Yew was not part of Hawthornden but was owned by the Trust and Hawthornden decided to approach the Trust to purchase Bukit Yew.

G

The facts, however, show that the trustees rather than selling the land to Hawthornden, sold it to the appellant who in turn considered arranging for a survey, valuation and prospective conversion. In June 1965 the Government gave notice of intended acquisition of the land but in March 1966 withdrew the notice. Nothing was done on the land subsequently until its sale in 1978 following an offer for its purchase. These are facts as found by the Special Commissioners.

H

What then is the intention of the appellant in acquiring the land. True they considered the possibility of developing it but the fact remains that they did not pursue that possibility. The Special Commissioners, however, found that the reason they did not develop it was because of the threat of acquisition by the Government. That threat was very short-lived and occurred soon after the appellant

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purchased the land. There was nothing to stop them from pursuing the professed objectives from 1966 onwards. A

The Special Commissioners found that the other reason why they did not pursue the objective was because the development of the land was to be made jointly with Hawthornden. This of course ignores their earlier finding that Hawthornden had attempted to acquire the land from the Trustees but was turned down. If the land was to be developed jointly, it would have been simpler for the Trustees to sell the land to Hawthornden. A fair inference is that on discovering that the land did not belong to Hawthornden, the appellant decided to keep the land to themselves and if there was going to be any development it was going to be independent of Hawthornden. B C

Another finding of the Special Commissioners was that the land was not developed because Hawthornden had found difficulty in obtaining piped water supply and road access. These were difficulties of Hawthornden, not the appellant.

It is clear that the Special Commissioners in determining the intention of the appellant did not treat the appellant as a separate legal entity and its findings of facts and inferences therefore were based on the motives and actions of Hawthornden. Without Hawthornden, the facts are that the appellant bought the land, did nothing and eventually sold it 14 years later. D

If there was any change of intention at all, the descendants of Loke Yew finally decided after 14 years that it was no longer worth to keep the land as a heritage from their ancestors. It is, however, not fair to conclude from this, as the Special Commissioners did, that 'the appellant retained the land with the purpose of hoarding it up in anticipation of a rise in value'. True the sale realised a price difference of $428,944 but this amount must be balanced with a purchase price of $162,752.80 which they had paid for 14 years previously and during which time the land brought them no income at all. The amount realised in fact represents no more than recovery of capital with compound interest at 9% over a period of more than 14 years between purchase and sale. Throughout the statement of the case the Special Commissioners appear to have over-emphasised this price difference and labeled it as profit to support their conviction of land dealing admitting of no other inference. E F G

[27] In *Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners* [1980] STC 350, Lionel Simmons Properties Ltd (LSP) was the parent company of a group of seven companies which was formed by S (theliquidator of LSP) at different times between 1957 and 1964, with the object of acquiring and developing various properties and ultimately floating a public company. All the companies, except one, were formed as property investment companies. In 1962, an association was formed with Bishopsgate, a quoted investment holding company which specialised in backing unquoted property investment companies in order that they could be brought to the market and publicly quoted. Since then Bishopsgate, directly or through LSP, had an interest in each company. In October 1963, S entered into an agreement with Bishopsgate not to alter, *inter alia*, LSP's memorandum or articles of H I

association or its business from that of property holding. In 1966, the group decided to go into liquidation because prospects in the field of property development and investment had become unfavourable. As a result, between 1967 and 1969 various properties held by the group were sold and the companies were assessed to corporation tax in respect of the surpluses arising on the sales. S as liquidator of LSP and other companies appealed contending that the surpluses were not trading profits but proceeds on the realisation of investments. The Special Commissioners, before whom the appeal came up for hearing, found that initially the properties were acquired 'primarily for the purposes of creating and retaining investments, and not primarily for the purposes of immediate sales after development', that the 'overall and eventual ambition or purpose of S personally was the floatation of a public company when sufficient and suitable investments had been gathered together' and that 'the composite intention to be attributed to the group was to aim at building up a suitable portfolio of investments but to allow the final decision whether to retain to await on events', and taking the view that 'the decision to liquidate was not inconsistent with the original aim — to create investments for retention where possible, or where not possible, for turning to account by way of trade', determined that the surpluses on the sale of certain properties by LSP and two other companies were trading profits. Goulding J allowed the appeal by S, holding that the commissioners' determination was inconsistent with their primary findings of fact. The Court of Appeal reversed his decision holding that until a decision was taken to treat a property as investment the surplus realized on its sale was assessable as a trading profit and that the commissioners, on the facts found, could properly infer that no such decision had been taken with regard to the properties in question. S as the liquidator of LSP appealed to the House of Lords. The House of Lords allowed the appeal and held that the commissioners' reference to the group's original aim to create investments for retention where possible, or where not possible for turning to account by way of trade, itself not a finding of fact, was inconsistent with the whole history of the group and with their clear finding that the initial intention of the group was primarily for the purpose of creating and retaining investments (and) not … for the purpose of immediate sale after development; further, they had made no finding or had any evidence of a trading intention on the part of the group at any stage of the transaction. It followed, therefore, that on the facts the sale of the properties in question was not a sale in the course of trading, but a realization of capital.

[28] Lord Wilberforce at pp 352–353 stated:

> What I think has to be considered here is, rather, precisely what the commissioners have found as to the companies' intentions, and whether their findings are consistent or intelligible. I do this with, I hope, a proper appreciation of the commissioners' presentation, and a disposition to uphold any decision of theirs on factual matters if I can properly do so.

One must ask, first, what the commissioners were required or entitled to find. Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock, and, I suppose, vice versa. Iffindings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax (*cf Sharkey (Inspector of Taxes) v Wernher*). What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor for it to possess an indeterminate status, neither trading stock nor permanent asset. It must be one or the other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review.

[29] Further down at pp 354–355 his Lordship stated:

The crown, naturally, relies strongly on the final sentence of the third paragraph. This they say is a finding of fact which ought not to be disturbed. If that is right, the appeal can be simply disposed of. But is it right? I must say that I cannot so read it. It does not profess, in itself, to be finding as to the 'original aim'. Rather it assumes, as was the case, that the original aim has been established already, and is concerned merely to state that the decision to liquidate was not inconsistent with it. Had they, then, already found that the original aim was, as stated, to invest for retention where possible, or, where not, to trade? I cannot find this. The initial intention is stated as 'primarily for the purposes of creating retaining investments' and 'not primarily for the purposes of immediate sales after development'. This is clear finding of an investment purpose, confirmed by the opening of the next paragraph. Mr. Simmons, the commissioners proceed, 'was or had to be prepared to realise one development (meaning I think any one development) to find … funds for another development', still quite clearly in the area of investment. In the latter part of the same paragraph it is said that, with the aim of building up an investment portfolio, the final decision might have to wait on events; very true, but far from a finding of an intention to trade. And again, as to the decision to liquidate, there is no finding that this involved a decision to trade; that would be a very odd finding indeed, and I find it neither expressed nor implied. So, when one reads this whole passage, and couples it with the record of each company formed as an investment company, in two cases to acquire a single property, associated with Bishopsgate Investment Trust Co Ltd, a company only interested in property investment and having an agreement that the investment status of each company would not be altered, acquiring one property only, in two cases, and in LSP's two properties, under what is called a primary intention to create and build up a portfolio, I can only ask where is the finding, or evidence, of a trading intention? Ifthere was such an intention, when was it formed? On the decision to liquidate?

But this did nothing more than put an end to Mr Simmons' investment plans. So I cannot avoid the conclusion that the reference to 'turning to account by way of trade' is inconsistent with the whole history and with the previous finding, and involves an assumption, per saltum, as to what had been found, not supported by the latter, and in any case not itself a finding of fact.

That this reference is illogical and ill-founded appears very clearly from what follows. This draws a line (not contended for by either side) between properties retained, or likely to be retained, as investments before the liquidation was contemplated, which are investments, and those which had not reached that state, which are trading stock. But on what principle, or rationale, can this be based? Itseems to presuppose that the properties remained, as it were, in the air, or in limbo, until development and letting was completed, and that if the portcullis of liquidation came down while they were in this state they became trading stock. This I find, with respect, incomprehensible. Before liquidation they must either have been investments or trading stock. If the latter, cadit quaestio, but that is not what is found. In the former, how was their status changed? Frustration of a plan for investment, which compels realization, even if foreseen as a possibility, surely cannot give rise to an intention to trade. Finally, the distinction, as drawn, does not even fit the facts. For in the case of *Twickenham and LSP (East Barnet Road)* development and letting had been completed before the liquidation (see above). But they are found to have been trading, because retention was 'unlikely', a further gloss on a strange rationale.

My Lords, I regret to have to subject the reasoning of the Special Commissioners, over which they evidently took much trouble, to what may appear to be excessive analysis. I am less reluctant to differ from them because their solution was not contended for, or it seems, tested by argument. If it had been, some of the anomaly in it might well have appeared and suffered reduction. For myself, having read the whole of the case stated, and having, as they did, followed the history of the group, I find the position, though complicated, reasonably plain. Mr Simmons wanted to build up an investment portfolio: he formed investment companies, allied himself with an investment trust, caused each (relevant) company to acquire one property, or at most two properties, to develop and let it, and was forced into a realization of these completed investments. This was simply a realisation of capital.

[30] At p 356, Lord Salmon stated:

A passage in the findings of the commissioners was strongly relied on by the respondents. It reads: 'The decision to liquidate was in our view not inconsistent with the original aim — to create investments for retention where possible, or where not possible for turning to account by way of trade'. A strange concept indeed. An investment does not turn into trading stock because it is sold….

[31] In *West v Phillips* (1958) 38 TC 203, the appellant (West) taking advantage of facilities available under the Housing (Financial Provisions) Act 1933, built between the years 1933 and 1941, 2,208 houses to let as an investment. During the same period he also built 287 other properties with the intention of selling when a favourable opportunity arose; most of them, however, were

still let in 1946. In 1942, he sold his remaining building plant and machinery and had built no houses since. There were no sales of the property of either category during the eight years ending 31.3.1946. By then rent control and the rising cost of repairs together with higher taxation had made the 2,208 houses built to let no longer a profitable investment, and the appellant's net income from rents could not meet the substantial arrears of income tax and surtax which he owed, while all his original hopes of paying off his building society mortgages out of his income had entirely disappeared. He, therefore, decided to sell whenever a house became vacant or whenever a sitting tenant made a suitable offer. On 1 February 1947, he set up an estate agency business primarily of selling his own property. During the seven years ended 31 March 1953, the appellant sold 474 properties of both categories, and alternative assessments to Income Tax under Case I of Schedule D as (a) builder; and (b) property dealer were made upon him on the surplus arising from those transactions. On appeal before the Special Commissioners, the appellant contended (*inter alia*) that (a) the building business ceased in 1942 and the assessments as builder should therefore be discharged; and (b) there was no evidence that he had carried on the trade of property dealer. The commissioners found that a business of property dealing had not been set up but that the trade or business of speculative builder was still alive and that, from 1 February 1947, all the properties were stock-in-trade of that business. The appeals were determined accordingly by discharge of the property dealing assessments and adjustment of the assessments as builder to agreed figures. It was held that whilst the 287 properties which the appellant built with the intention of selling ultimately were stock-in-trade of the business of builder, the 2,208 houses built to let were investments and any surplus arising from their sale was therefore not liable to tax; (2) that the appellant was not carrying on the business of property dealing.

[32] At pp 212–214, Wynn-Parry J stated:

> Now I must refer to what I regard as two of the most important sub-paras in the case stated. They are sub-paras (vii) and (viii) of para 4, and I propose to read them.
>
> (vii) During the war the cost of house repairs increased. Mr West had to pay £30,000 for war damage insurance. The standard rate of Income Tax and rates of Surtax increased. The net yield from rents, which Mr West had estimated in 1933, when he decided to build the class 'A' houses, would be available year by year to meet the capital element in the building society repayments, gradually decreased and finally vanished. Class 'A' and class 'B' houses were rent controlled. By March 1946, he owed substantial arrears of Income Tax and Surtax and he was also unable to meet the tax liability for the then current year. He arranged with the Inland Revenue to pay £2,000 a month, but his net income from rents was inadequate to enable him to pay that monthly sum.

A (viii) In 1946 Mr West changed his intention in regard to class 'A' houses and decided to sell such of them as became vacant or whenever a sitting tenant made a suitable offer. There was a number of reasons for this change of policy. The combination of a rise in the cost of repairs and of higher taxation with the existence of rent control during and after the war made the class 'A' houses no longer a profitable investment. Furthermore, all hope of paying off his mortgages to building societies out of the net yield from rents had, as stated above in sub-paragraph (vii), entirely disappeared. No evidence was before us as to the percentage of the original building society advances still outstanding on these houses in 1946, but it was very considerable. On the other hand the local authority raised no objection to the sale of class 'A' houses once the war was over, and the market price for such houses was steadily rising, although the price payable by a sitting tenant was considerably less than the vacant possession price.

[33] Then there is a reference to a method adopted by Mr West to facilitate quick sales, and the sub-para goes on:

Mr West also had, from 1946 onwards, a number of enquiries from individuals and agents concerning the possibility of their purchasing large blocks of property from him. He declined all these offers because the price he would have obtained from such block sales would not have enabled him to clear his liabilities to his bankers, to the building societies, and in respect of arrears of taxation.

With all respect to the Special Commissioners, I do not think that they could have expressed in clearer or more forceful language the reasons which actuated Mr. West to change his intention; that change being, as I read those sub-paras, from the policy followed up till then of holding his investments in a form of property which was rapidly becoming a form of property which not only produced no profits but was becoming a liability.

It is those reasons which in my view must be borne in mind all through the consideration of this case. It comes to this. The house property had become more of a liability than a profit; he had to find moneys to clear his liabilities to his bankers, to the building societies, and in respect of arrears of taxation, to quote the end of sub-para (viii), and he was fortunately in 1946 put in a position to be able to sell as the restriction on his right to sell had been removed because the local authority raised no objection to his selling these class 'A' houses. If there had been no class 'B' houses, it is clear, pausing at that point, that the course which Mr West followed was wholly consistent with his selling investments, with the result that any surplus on the sale would not be liable to tax.

Now I come back to para 7 of the Case and to the sub-paragraph which sets out the Special Commissioners' summary of the evidence, though I bear in mind, of course, that quite rightly they say in their finding in the following paragraph that they have considered all the evidence; but in this paragraph to which I now direct my attention they summarise those points in the evidence which have really led to their conclusion:

> The question we have to decide is what is the character to be attributed to the transactions. We have already decided that the class 'B' houses were at all times trading stock. On the evidence adduced before us in respect of the class 'A' houses, Mr West changed his intention during the year ending 31 March 1947. In that year he decided to sell whenever a house became vacant or whenever a tenant made a suitable offer, and on 1 February 1947, he set up an estate agency business which had its own staff and an experienced estate agent as the chief employee. As they became vacant, Mr West's class 'A' and class 'B' houses were redecorated and made ready for sale and were advertised for sale by his estate agency.

Let me now examine those various points separately. I accept, as I shave already indicated, the Commissioners' decision that the class 'B' houses were at all times trading stock. It is also accurate, as far as it goes, to say that in respect of the class 'A' houses Mr West changed his intention during the year ending 31 March 1947. But it is an omission, and in my view a very serious omission, from the statement of the evidence that no reference is made to the completely compelling reasons which led Mr West to change his intention during the year ended 31 March 1947, and it is not in my view right for the Commissioners to use as part of the material on which they draw the inference which they have drawn the change of intention, without taking into account the reason for the change. The reason for the change colours, and colours heavily, the whole matter. I accept that the Commissioners are right in saying that in that year, namely, 1947, he decided to sell whenever a house became vacant or whenever a tenant made a suitable offer. But that decision, again, was come to because of the considerations which appear in the facts found in sub-paras (vii) and (viii) of para 4 of the Case.

Then they say that on 1 February 1947, he set up an estate agency business which had its own staff and experienced estate agent as a chief employee. That is not in dispute. That, as I see it, on the facts which the Commissioners state, was an entirely separate business. Indeed, it has been converted into a limited company. True it is that it is an organization set up for the purpose, *inter alia*, of selling the class 'A' houses. That of itself, as I read the authorities, would not be sufficient to change the quality of the class 'A' houses regarded as an investment. It would merely mean that he was setting up an organization as a convenient method of realising investment property consisting of a large number of component parts.

….

If I were dealing only with class 'A' houses, taking those points separately — redecoration, making ready for sale and advertising for sale — they are, to my mind, colourless. Taken together, they remain to my mind colourless. The only question is, is the position completely changed because Mr West designed to deal with the class 'A' and class 'B' houses together? That, as it seems to me, upon analysis, is all that is left to the Commissioners upon which to find the inference that Mr West changed the quality of the class 'A' houses from investments to stock-in-trade of his business. In my judgment, the mere circumstance that he dealt with the class 'A' and class 'B' houses together cannot reasonably lead to the conclusion that he was designing to alter or was altering the character of the class 'A' houses as investments.

Mr West has been, as the Case shows, in business for a great many years. I think it is a perfectly justifiable inference from the matter in the Case, and not straying outside the Case, that Mr West must be taken to have known the difference between stock-in-trade and capital. I ask myself this question: at this critical time when he needed to sell the class 'A' houses in order to get the maximum amount of money to pay his bankers, his debts to the building society, his arrears of taxation, could it be possibly predicted to him that he would design to conduct that sale in such a way as to attract taxation? When I consider the reasons for which he sold and the fact that the class 'A' houses always have been investments, and when I take into account, as I consider I am not only entitled to but bound to take into account, Mr West's business experience, I am led to the conclusion that the only reasonable conclusion on the primary facts is that Mr West had no such intention as the Commissioners imputed to him to convert these houses into stock-in-trade of his inactive business as a builder. I can see no shadow of reason why it can be suggested that he should design to do so, and I therefore come to the conclusion that the fact that he dealt with the class 'A' and class 'B' houses together does not provide material on which the Commissioners were entitled to come to the conclusion to which they did come.

[34] The respondent in its submission referred mostly to the same authorities as those referred to by the appellant. Anyway, the respondent relied strongly on the decision in *International Investment Ltd v Comptroller-General of Inland Revenue* [1979] 1 MLJ 4. In that case, one of the objects of the appellant was to traffic and otherwise deal in or turn to account immovable property. The appellant had acquired certain lands and had begun building operations on the lands. Subsequently, it agreed to sell the lands and the uncompleted building on it to another company in exchange for shares in the company. These shares were subsequently transferred by the company. The company was assessed to tax on the profits obtained by it. On appeal the Special Commissioners upheld the assessment and a further appeal to the High Court by way of case stated was dismissed. An appeal from the judgment of the High Court was dismissed by the Federal Court and the appellant company appealed. It was argued on behalf of the appellant that the profit was not and could not be taxable as income under s 10(1)(a) of the Income Tax Ordinance 1947, because the transaction from which it was received was an isolated transaction which did not constitute the carrying on of a trade or business. It might have been an adventure in the nature of trade but it could not have been trading because trading necessarily involved some repetition or continuity of operation and that element was lacking in the case. It was also argued that in any event the facts showed that when the appellant company acquired and developed the property, it was not trafficking or dealing in land but was investing in land, and any profit on the realisation of its investment was not of an income nature and would not be assessable to income tax. The Privy Council held that a company whose business is or includes trading prima facie begins to trade as soon as it embarks upon the first transaction of a trading nature. The transaction in this case could therefore constitute trading even if it was isolated.

[35] Viscount Dilhorne (delivering the judgment of the Board) stated at p 4:

> The appellant company was incorporated in 1962 with the objects *inter alia* of trafficking and otherwise dealing in or turning to account lands buildings and immovable property of any description. Its Memorandum of Association also included a wide variety of other objects including developing land and investing in shares and securities….

[36] Further down at pp 5 and 6 his Lordship stated:

> The argument for the appellant company had two main branches. First it was said that the profit with which this appeal is concerned was not, and could not be, taxable as income under s 10(1)(a) because the transaction from which it was received was an isolated transaction which did not constitute the carrying on of a trade or business. It might have been an adventure in the nature of trade, but it could not have been trading because trading necessarily involves some repetition or continuity of operation, and that element was lacking here. The second argument was that in any event the facts showed that, when the appellant company acquired and developed the property at Penang Road, it was not trafficking or dealing in land but was investing in land, and that any profit made on the realization of its investment was not of an income nature and was not assessable to income tax.
>
> …. As their Lordships understood the argument of Mr Pinson for the appellant company, he did not dispute that this was a business transaction, but he submitted that it was not in the course of carrying on the particular business of dealing or trading in land because it was an isolated transaction, and that it would not have been in the course of dealing in land even if such dealing had been the company's only object. Their Lordships are unable to accept that submission. In their view a company whose business is, or includes, trading *prima facie* begins to trade as soon as it embarks upon the first transaction of a trading nature. The same would apply to an individual who had set himself up as a trader and declared his intention of trading if the transaction fell within the scope of his trade; only if he had no business, or if the isolated transaction was not within the scope of his trade, would the result be otherwise. No doubt trading normally involves an element of repetition or continuity, but it has to begin sometime and even if it only continues for a short time and only includes one transaction, that does not by itself mean that the transaction cannot constitute trading — see *Commissioner for Inland Revenue v Leydenberg Platinum Ltd.*
>
> The second argument on behalf of the appellant company was that the profit was derived from investing in land and that it was therefore of a capital nature. The argument turns entirely upon the facts. The most important facts which, in the opinion of their Lordships, the Special Commissioners were entitled to regard as indicating that the appellant company was carrying on the business of dealing in land and that the Penang Road transaction forms part of that business are as follows. The importance, if any, to be attached to each item is entirely for the Special Commissioners to judge.
>
> First, the appellant company's accountants wrote on 16 August 1962, in reply to an enquiry on a standard form from the Inland Revenue, stating that 'the nature of

the business conducted by the company is dealing in immovable property and land development'. In their Lordships' view that statement is certainly capable of being read as a direct admission that the company was carrying on the business of dealing in land. Whether it should be so read, and, if so, what importance should be attached to it, are questions for the Special Commissioners.

Second, the work in progress on the International Building was shown in the balance sheet at 31 December 1962 under current assets. That is difficult to reconcile with another entry in the balance sheet showing the land on which the building was being erected as a fixed asset, but it is consistent with the fact that the building work during 1962 and 1963 was entirely financed by bank overdraft and other short-term loans. The Special Commissioners were fully entitled to refuse, as they did, to regard the entry under current assets as a mistake and to regard it as an indication that the appellant company was treating the building as trading stock, not as an investment.

[37] In *NYF Realty Sdn Bhd v Comptroller of Inland Revenue* [1974] 1 MLJ 182 at pps 182–183 Sharma J said:

This is a case stated by the Special Commissioners and the only question involved in this appeal is whether the appellants were holding their immovable properties as investments or were trading and/or carrying on a business of purchase and sale of land they had acquired. Profits derived from the purchase and resale of property are not, per se, subject to income tax. While the Act does not specifically exempt capital gains or otherwise exclude such gains from income, the courts have held that the mere realization of capital appreciation is not income under the ordinary concepts and usages of mankind. However, the Act (ie Income Tax Act) does require that taxable income shall include:

(1) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit making by sale; or

(2) profit arising from the carrying out of any profit making undertaking or scheme.

Most of the cases which have been decided on the subject have involved the application of the first of the above requirements. In determining the application of these requirements the focal point of enquiry is the dominant purpose for which the particular property was originally acquired. If it is established that the dominant purpose in the acquisition of property was its resale at a profit, the presence of other purposes, such as the rental of that property does not remove any profit on ultimate sale from the taxable area.

Again the mere presence of an intention to sell property at a profit at some future date is not, of itself, sufficient to cause the profit to be taxable if the dominant motive in purchasing the property was not expectation of profit by sale. (Emphasis added.)

[38] In the present appeal the Special Commissioners in the case stated came to the following conclusion:

In this case it must be noted that plain land has been converted into land ready for development. The character of the land as originally purchased had changed. This must be viewed with the principal activity of the appellants which is that of property development. This plays an important role in ascertaining the activity of the appellants as indicated by the case of *Taylor* v *Good* 49 TC 277 where a taxpayer who had obtained planning permission for his property was held not assessable to tax upon its sale. Russel LJ said at p 296:

> … the cases, it seems to me point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, *not being himself a developer*, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development.

As their principal object is that of property development the position of the Appellants would be different as the above case indicates. The appellants also ought to be aware that a company which describes its business as property development or itself as property developer is *prima facie* carrying on the business of property development for sale and not for investment or for both (see *Mount Elazabeth (Pte) Ltd v Comptroller of Income Tax* [1987] 2 MLJ 130).

[39] Reading the above, I find that the Special Commissioners came to the conclusion that the appellant was carrying on the principal activity of land development on the following grounds:

(i) the subject land has been converted into land ready for development;

(ii) the character of the land as originally purchased had changed; and

(iii) the principal activity of the appellant which is that of property development.

[40] I could not find anywhere in the case stated to support the above finding by the Special Commissioners. Bearing in mind that the subject property is situated in the golden triangle, the land used there is only for commercial, office complexes and hotels or multi-rise apartments. Thus there is no necessity for any conversion when the appellant applied to build a 30-storey office block. As can be seen from the evidence the appellant applied to build the 30-storey block from the relevant authorities and it was approved without any conversion. In fact, I could not find anywhere to show that the appellant made any application to convert.

[41] I could not find any evidence to show that the character of the land had been changed. I am at a loss as to how the Special Commissioners came to this conclusion. The Special Commissioners did not specify the change from which character to which character. If the Special Commissioners meant the change of character was from a vacant land to an office block, then the Special Commissioners would obviously be in error. The subject property is situated within the golden triangle, an area where the potentiality of the land being developed is very eminent. As I see it, it is up to the various landowners what type of building to be built on their land whether an office block, a

commercial complex, a hotel or an apartment. I believe there is no necessity for the owners (including the appellant) to apply for conversion or change of character because the land are situated in an area to be developed as such.

[42] As to the last finding that the principal activity of the appellant was a property developer, I could not find any evidence to that effect. The evidence shows that the subject property was the only property bought and kept by the appellant for investment. There is no evidence to show that the appellant had been dealing in land before they acquired the subject property. There is no evidence to show that the appellant have other transactions in properties before. There is also no evidence to show that the appellant was a developer before the transaction. The purchase of the said property was the only transaction carried out by the appellant. As such it could not be said that dealing in land is the principal activity of the appellant.

[43] It is not disputed that the appellant acquired the property in 1980. Itwas contended by the appellant that when they purchased the subject property it was with the intention to build a multi-storey office block of their own which is an investment. There is no evidence to show otherwise. As can be seen from the evidence, in order to carry out that intention they had submitted development plans to build a 31-storey office block which was approved by the Dewan Bandaraya Kuala Lumpur (DBKL). These plans were subsequently amended to a 30-storey office block. In preparation to build the office block the appellant cleared all the squatters on the said land by paying them compensation. In addition, the appellant conducted soil tests on the subject property to ensure that the soil could take a 31-storey building. The appellant also engaged architects to put up the site and building plans for approval by DBKL. The building plans were approved by DBKL on 20August 1982 and the amended plans were approved on 24 April 1985. The amendment was a decision by the new management of the appellant who took over the management in 1985 or just before 1985. The only thing left for the appellant to do was to construct the building itself but it was put on hold because of the depression and the influx of office spaces in that area. As I have stated earlier, only a portion of the subject property would be used for the building. The portion which was not earmarked for the building was rented out as a carpark and the income from the rental was taxed by the Revenue. In July 1990 the unused portion was sold when there was a good offer from Chanrai Investment Corporation. In respect of the sale of the unused portion, there was no evidence to show that the appellant made preparation for the sale such as advertising or that the appellant had opened an office just for the purpose of selling the unused portion or other activity pertaining to sale or development of the unused portion. The evidence shows that the sale of the unused portion was by chance in that there was a good offer by Chanrai Investment Corporation and it was on the unused portion which prompted the appellant to sell the land. The badges of trade does not exist in this sale. It is also not

disputed that the appellant kept the land for more than ten years which shows that when the appellant purchased the land it was for investment. Thus the sale and the profit made was nothing more than realization of a capital asset.

[44] As I have stated earlier, the appellant kept the land for more than 10 years. From the authorities I have cited above it is established that the length of time a person holding a property or a piece of land is an indicator whether the land is for investment or otherwise. Investment is one of the objects stated in the appellant's Memorandum and Articles of Association. Holding the land for more than ten years is a clear indication that the appellant, when they purchased the subject property, did it for investment. The appellant were lucky because the subject property appreciated in value.

[45] From the evidence, I am of the view that the Special Commissioners were in error in holding that the sale of a portion of the subject property constitutes trading or business dealing in land because there is no evidence to support this finding.

(2) The account

[46] The Special Commissioners also found that the appellant was trading because of the entries in the account (the balance sheet) of the appellant. The Special Commissioners dealt at great length in respect of this. It is better for me to quote what the Special Commissioners found in respect of the entry:

> Be that as it may, the manner in which the accounts relating to the subject land has been treated precludes us from giving the Chairman's Statement the effect claimed. In their submission the Appellants contended that the revalued land and related development expenditure were consistently shown in the company's balance sheet as 'Land & Development Expenditure' immediately after the heading of 'Fixed Assets' and not classified as inventories under 'Current Assets'. They added that should the subject land be purchased as stock-in-trade it would have to be classified as inventories under 'Current Assets' in accordance with Approved Accounting Standard 5 as adopted by the Council of the Malaysian Institute of Accountants and Technical Bulletin 2.
>
> …
>
> It is settled law that Income Tax does not necessarily follow the system of accounting or account-keeping of the taxpayer at all (see *Bernhard v Gohan* 13 TC 735). The method of keeping accounts is often a guide but is never conclusive in Income Tax issues (see *Gold Coast Selection Trust Ltd v Humphrey* 30 TC 228). The method of accounting does not alter the character of the sum received (see *The Seaham Harbour Dock Co v Crook* 16 TC 347). Finally, the practice of accountants, though it were general or even universal, could not by itself determine the amount of profits and gains of a trade for tax purposes (see *Duple Motor Bodies Ltd v Ostime* 39 TC 566). In *Bukit Yew Sdn Bhd* v *DGIR* [1987] 2 MLJ 379 Harun J (as he then was) said at p 382:

A The way in which a company keeps its accounts may be evidence of the company's intention but such evidence must be weighed against other evidence to decide the nature of the transaction: *Shadford (HM Inspector of Taxes)* v *H Fairweather* 43 TC 291 at p 299.

B A plethora of cases can be cited where land described as Fixed Assets in the accounts of a company was held to be a trading asset upon its disposal. See, for example, *Shadford v Fairweather & Co Ltd* 43 TC 291; *Bowie (HM Taxes) v Reg. Dunn (Builders) Ltd* 49 TC 469; *WM Robb Ltd v Page* 47 TC 465.

C In this case the appellants have not complied with the accounting practice of the Malaysian Association of Certified Public Accountants despite their references to such practice in support of their case. We shall first deal with the submission of the appellants that if the subject land were to be considered as stock-in-trade it ought to have been classified as inventory under current assets in accordance with Approved Accounting Standard 5. Clause 13 of the said Approved Accounting Standard 5 merely states that inventories shall be disclosed under current assets and nothing further. *Fundamental Accounting Principles* by Pyle and Carson (10 Ed) says what an inventory is at p 324:

D

> A company's inventory should include all goods owned by the business and held for sale, regardless of where the goods may be located at the time of the inventory.

E Clause 4 of the International Accounting Standard 5, Valuation and Presentation of Inventories in the Context of the Historical Cost System defines inventories as follows:

> Inventories are tangible property: (a) held for sale in the ordinary course of business; (b) in the process of production for such sale; or (c) to be consumed in the production of goods or services for sale.

F **[47]** Let us pause for a moment here to point out the error committed by the Special Commissioners. It was the contention of the appellant that the said land was not a stock-in-trade but held for investment and development. It is certainly not in the interest of the appellant to state in their account that the land as stock-in-trade and be classified as inventory under current accounts.

G **[48]** The Special Commissioners then went on to state:

> However, what has been defined above is the general provision relating to inventories. *In the case of land held for development and resale specific provisions have been made as will be stated shortly*…. (Emphasis added.)

H **[49]** In my view, the Special Commissioners have made an error because it was the contention of the appellant throughout that the subject land was held as an investment and to develop it into a multi-storey office building of their own and not held for development and resale. The learned Special Commissioners further stated:

I

> … Clause 6 of the International Accounting Standard 5 says that all material information should be disclosed as is necessary to make the financial statements

clear and understandable. Section 167 of the Companies Act 1965 is to the same effect. Clause 8 says that the amounts and classifications of items should be supplemented if necessary by additional information to make their meanings clear and that significant items should not be included with, or offset against, other items, without separate identification. Technical Bulletin 2 deals with the manner of classifying land held as long-term investment and for sale. Clause 11 of that Bulletin provides as follows:

> 11 The Directors' representation will enable the following treatments to be made with a reasonable degree of assurance:
>
> (a) Land held for development and resale
>
> The Accounting and Auditing Standards Committee recommends that land held for development and resale be considered as inventories and accordingly should be classified under current assets. Such land should be reflected in the financial statement at lower of cost or net realisable value.
>
> Only expenses directly related to the acquisition and conversion of the land can fairly be included as cost. These expenses would include legal and professional fees as well as interest payments.
>
> (b) *Land held for long-term investment*
>
> The Accounting and Auditing Standards Committee recommends that land held for long-term investment be classified as a long term asset and revaluation may be allowed on a proper basis.
>
> It is recommended that such valuation be carried out by a recognised professional valuer on the existing (current) use basis. The revaluation surplus may be allowed for distribution as bonus issue but the surplus for distribution should be net of taxation.

International Accounting Standard 25, Accounting for Investments which came into force on 1 January 1987 also states that properties held as long-term investments should be accounted for as such. However in this case the subject land does not appear under the Fixed Assets column of the appellant's accounts as a long-term asset as it rightfully should be if the appellants' accounts are to be construed in their favour. Neither has it been classified as an inventory. It is separately classified as 'Development Properties'. Thus there is a doubt on the actual classification of the subject land. It is to avoid doubts of this nature that Technical Bulletin 2 has Clause 10 which reads as follows:

> The Accounting and Auditing Standards Committee recommends that members obtain written representations from a Board of Directors of clients with material holdings in land that such assets are held either as long-term investments or with the intention of development and resale in the short term.

[50] In the present appeal the learned Special Commissioners stated:

> …. However in this case the subject land does not appear under the fixed assets column of the appellant's accounts as a long-term asset as it rightfully should be if the appellants' accounts are to be construed in their favour. Neither has it been classified as an inventory. It is separately classified as 'Development Properties'.

[51] First of all, it is observed that the accounting practice of the Malaysian Association of Certified Public Accountants was only a guideline to all certified accountants how an account be kept. As I have stated earlier, the appellant maintained throughout that the subject land was held as a long-term investment and as such it should be under cl 11(b). In accordance with that provision the appellant had revalued the subject land and entered the revalued amount in the account. This revalued amount and the development expenditure had been entered in the account and the balance sheet of the appellant consistently under the heading of 'development properties' which is under the main heading of 'fixed assets'. Under this main heading is also found the heading of 'land and development expenditure'. Though the heading of 'land for investment' is not used for the heading of 'development properties', we know that the subject land is to be held for investment and that was the reason why it is placed under the main heading of 'fixed assets'. The terminology 'development properties' was used because the subject was earmarked for development of a 30-storey office complex. The appellant did not put it under the 'land held for development and resale' because it was not the intention of the appellant to resell the subject land. The land was to be developed into a 30-storey office block and the subject land and the office block to be held as long-term investment. That was the reason why the entry was made that the subject land came under the main heading 'fixed assets' and not 'current assets' or 'stock-in-trade'. It might be the wrong terminology but the fact remained that the subject land was intended and held as investment throughout.

[52] The Special Commissioners found fault in this. The Special Commissioners took the view that the subject land should be termed as 'land for development and resale' or 'inventory' under the main heading 'current assets'. For that the Special Commissioners found that the account was unsatisfactory and the subject land should be under the heading or item as suggested by them. For that the Special Commissioners found the account showed that the appellant was trading in land.

[53] It is my observation that the Special Commissioners were in error in trying to juggle the subject land to be under what heading or item in the account. It is not the duty of the Special Commissioners. The duty of the Special Commissioners is to decide whether the entry made is really what it is purported to be and not try to correct it. It is for the Special Commissioners to decide whether the subject land was actually a 'fixed asset' as stated by the appellant or otherwise.

[54] The Special Commissioners in the case stated found that the balance sheet did not show the land as an inventory, it was also not shown that it was held as long-term investments. The appellant's accounts merely stated that the land which is the only asset of the company as 'development properties'. In this respect the Special Commissioners stated as follows:

…. Be that as it may, the accounts for year ended 1990 and 1991 resolve the doubt. The profit arising from the sale of the subject land appears in the Trading, Profit and Loss Account for the year ended 31 December 1990 while in the balance sheet at that date a sum of $38,228,729 appears under current assets as 'other debtor'. The balance sheet as at 31 December 1991 shows only $2,128,017 under current assets for 'other debtor' while a sum of $20,049,543 appears as 'fixed deposit with a financial institution' under current assets. Clause 9 of the International Accounting Standard 7, Statement of Changes in Financial Position provides that proceeds from the sale of long-term assets must be stated separately from the funds provided from or used in the operations. No such separate statement has been made by the appellants in their accounts. Again no evidence was adduced by the appellants to explain why the accounts were prepared in that way without a separate statement as required.

[55] In *Bukit Yew Sdn Bhd v Director-General of Inland Revenue* at pp 382–383, Harun J said:

Accounting

Finally, the Special Commissioners laid much stress in the manner the Taxpayers' accounts were kept. The way in which a company keeps its accounts may be evidence of the company's intention but such evidence must be weighed against other evidence to decide the nature of the transaction: *Shadford (HM Inspector of Taxes) v H Fairweather* at p 299.

Here during each year from 1966 to 1977 the Director's Report stated:

> The company has not yet commenced trading and no contingent liabilities were undertaken by the company in the period covered by the Profit and Loss Account.

And for 1978, the Director's Report stated:

Negotiations for the sale of Lot 1305 in the Mukim of Setapak at a price of $591,697 continue and it is anticipated that these should be satisfactorily concluded in the very near future.

In the 1979 accounts, the proceeds of this sale were placed on 'Capital Reserve'. However, in the same report the Directors stated that the

> 'principal activity of the Company consists of land development and transactions involving land'.

The Special Commissioners held that this statement is an admission by the taxpayer of the true nature of the transaction and that was why the accountants did not describe the land as a 'fixed asset' but as 'Land and Development at Cost'. They were also not impressed by the provision for capital gains tax instead ofincome tax. However, their finding contrasts with their other finding at p 11 para XLii:

> the only business carried on by the appellant was the acquisition and sale of Bukit Yew.

The Special Commissioners found that the auditors of the appellant 'reflected their uncertainty as to the nature of the asset by describing it not as a fixed asset but as 'Land & Development at Cost' and the 'appellant's own uncertainty as to the nature of the asset, the proceeds of the sale were placed by the appellant in a fixed deposit account with the bank and as a result interest was earned for years ending 31 December 1979, and 31 December 1980.

The Special Commissioners made no mention of the fact that the auditors were complying with the accounting practice of the Malaysian Association of Certified Public Accountants, in respect of accounting description of land matters, in particular to differentiate between lands held for long term investment and lands held for development and resale. The fact that the proceeds of sale were placed on fixed bank deposits (which naturally earns interest) does not necessarily mean uncertainty of the nature of the asset.

The Issue

The question before the Special Commissioners was whether the transaction viz. the purchase of sale of Lot 1305 by the appellant constituted an adventure in the nature of trade the proceeds of which are subject to payment of income tax under the Income Tax Act 1967, or whether the transaction was the realization of a capital asset the proceeds of which are subject to payment of real property gains tax under the Real Property Gains Tax Act 1976.

The Special Commissioners held that the transaction was an adventure in trade, dismissed the appeal and confirmed the assessment.

On the facts as found by the Special Commissioners, the decision cannot be upheld for the following reasons:

(a) The Special Commissioners have mixed findings of facts with inferences.

(b) The finding that the appellant company is a subsidiary of Hawthornden is clearly erroneous.

(c) The deliberations of the Board of Directors of Hawthornden before the establishment of the appellant company were wrongly imputed to the appellant.

(d) In deciding the intention of the appellant with regard to the nature of the transaction, the Special Commissioners relied heavily and erroneously on the intentions of Hawthornden.

(e) If the evidence with regard to Hawthornden were deleted from the record, there was little or no evidence to support the finding.

(f) There was no evidence that the appellant was engaged in trading as professed in its Memorandum of Association.

(g) The fact that the appellant merely considered but did not proceed with developing the land should not have been held to be a change of intention. Nor should the fact of intended acquisition

of the land by the Government (which was in any event short-lived) been taken as a relevant factor ascribed to change of intention.

(h) The fact that the land was held for more than 14 years undeveloped and earning no income should have tilted the scales in favour of the appellant.

(i) The circumstances of the purchase of the land, its subsequent sale and the accounts do not show conclusively that this sale transaction of the appellant was in the nature of an adventure in trade.

With respect to the Special Commissioners, their exposition of the law on the issues before them are correct but their application of the law and the authorities to the facts are erroneous due to their wrong findings of facts. Indeed if the Special Commissioners had not deviated from the agreed statement of facts, they should not have come to the conclusion that they did. I would accordingly allow the appeal and set aside the Deciding Order of the Special Commissioners, with costs here and below.

[56] In *Lower Perak Co-operative Housing Society Bhd v Ketua Pengarah Hasil Dalam Negeri* Edgar Joseph Jr FJ stated at pp 745–746:

Asset Enhancement and Stock-In-Trade

We have already noted from the authorities cited that merely improving the value of land by clearing it, carrying out all necessary surveys, sub-dividing it, constructing roads, drains, installing water and electricity to render it saleable (ormore saleable) in regard to a single transaction to sell at a suitable pre-selected time or in certain circumstances, does not warrant the same definite conclusion as regard trading or even that the transaction is in the nature of trade. (Per Lord Carmont in *Commissioners of Inland Revenue v Reinhold*). In such a situation, in no sense does the land become part of the raw materials of trade, namely, trading stock.

The special commissioners had held that the land was held as stock-in-trade because the taxpayer was trading. True it is that if the taxpayer had been trading then the asset would be stock-in-trade and its sale or realization at a profit would yield proceeds of an income nature liable to be brought into the computation of income tax. But if, on the other hand, the taxpayer had *not* been trading, then the asset would have been of a capital nature and its sale or realisation at a profit, would have been a capital gain not liable to be brought into the computation of income tax.

It follows that whether or not the lots disposed of by the taxpayer to the developer were stock-in-trade depends on whether it can be established that the taxpayer was, at the material time, trading or been engaged in an adventure in the nature of trade. That is the key question. We are fortified in this view, by a consideration of the definition of stock-in-trade appearing in s 2 of the Act, which reads:

A 'stock in trade', in relation to a business, means property of any description, whether movable or immovable, being either:

(a) property such as is sold in the ordinary course of the business or would be so sold if it were mature or if its manufacture, preparation or construction were complete; or

B

(b) materials such as are used in the manufacture, preparation or construction of any such property as is referred to in paragraph (a) of this definition, and includes any work in progress …

Our definition of stock-in-trade is taken from the United Kingdom Taxes Act
C 1970. The later equivalent in the United Kingdom of the definition of 'stock-in-trade' is to be found in s 137(4) of the Taxes Act 1970, and the present equivalent s100 of the Taxes Act 1988. We may therefore read with profit what the House of Lords had to say about the meaning of the expression 'stock-in-trade' in *Reed v Nova Securities Ltd.* Lord Templeman speaking for the House said this (atp692h–j):

D

If a company is to acquire an asset as trading stock, the asset must not only be of a kind which is sold in the ordinary course of the company's trade but must also be *acquired for the purposes of that trade* with a view to a resale at a profit.

[57] There is no doubt in my mind that the accounts of the appellant have
E much to be desired but then we have to appreciate the difficulties in maintaining the accounts in the present appeal. In the present appeal the appellant have only one piece of land which had been merged from smaller pieces of land. From the time when they bought the land, it was treated as one piece of land. They had sold a portion of the land and not the whole land nor any identifiable
F part of the land. Obviously there was profit from the sale of the land. It is clear that the disposal has to appear somewhere. Since there was a sale and profit made from the sale, the appellant's accountant had termed them under the heading of 'trading, profit and loss account'. This is the point that the Special Commissioners stated the account shows that the appellant was
G trading. One could not just decide based on what the appellant was trading or business dealing in land. The account is only an aid and not the deciding factor to determine whether a person is trading or otherwise. This can be seen from the authorities I have cited above.

[58] I am in entire agreement with the Special Commissioners that the
H accounts of the appellant were messy and not properly kept, but that does not mean that the appellant was trading or having business dealing in land. I have to view the transaction which generated the income in entirety. The evidence shows that in 1980 the appellant purchased the land as investment to build their multi-storey office block. The intention at the time when it was purchased
I was to keep it as an investment. The appellant held on to the land as investment until today except that in 1990 a portion of the land which was not required by them for the building was disposed by them when they were offered a

good price for it. That is the subject matter of this appeal. There is no evidence to show that the appellant was trading or dealing in land before the transaction or after that transaction. There is also no evidence to show that the appellant was making any preparation to trade in land or to do any development to resell. The transaction was an isolated transaction. It was the intention of the appellant throughout and until today that they purchased the property for investment. There is no evidence of change of intention. It is clear that the subject land was an investment which is one of the objects provided for by the Memorandum and Articles of Association of the appellant. In my view, itwould not make any difference whether the appellant disposed of the whole subject land or a portion of it. In either case it is a disposal of a capital asset.

[59] For the above reasons I find that the Special Commissioners have erred in their finding. I would therefore allow the appeal by the appellant with costs here and below. The decision of the Special Commissioners is hereby set aside and the assessments in respect of the sale of the land is hereby quashed. The deposit is to be refunded to the appellant.

[60] My learned brother, Md Raus Shariff J, had seen this judgment in draft and agreed to it.

Abdul Aziz JCA (delivering dissenting judgment):

[61] The appellants, a private limited company, were incorporated on 8August 1979. Their principal object was to carry on 'the business of property developers and building contractors'. On 28 March 1980 they purchased seven lots of land at a public auction ordered under s 259 of the National Land Code 1965 for RM6,100,000. The seven lots had a total area of 190,248.30 square feet. 10 or 11 years later, they entered into a sale and purchase agreement with another company to sell to that company four of the lots, which had a total area of 101,004.75 square feet ('the subject land'), for RM42,500,000. Onthe gains from the sale, the appellants were assessed to income tax of RM13,185,916.09. The appellants appealed to the Special Commissioners on the ground that the gains were derived not from the carrying on of their business but from the sale of an investment and were therefore not assessable to income tax. The Special Commissioners found that the appellants failed to show that the subject land was held by them as an investment and dismissed their appeal. Their appeal to the High Court was also dismissed.

[62] The question in this appeal is whether, contrary to the findings of the Special Commissioners and the High Court, there is evidence that the appellants held the subject land as an investment. It is common ground that the question depends on the intention of the appellants when they purchased the seven lots, provided the intention remained the same. If the intention was to trade, that is to dispose of the seven lots at a profit, then the gains would be assessable to income tax. If the intention was to keep them as an investment, then the

gains were not assessable to income tax. There was no direct evidence of intention as at the time of purchase. So the appellants relied on evidence of circumstances after the purchase as indicating intention of investment at the time of purchase.

[63] In this appeal, the appellants, while falling back on the appellant's notes of submission in the High Court, stated in their written appellant's brief submission that they relied on four grounds for contending that the seven lots were acquired as an investment. In the appellant's notes of submission, the circumstance that the appellants relied on firstly was the manner in which they treated the seven lots in their first set of audited accounts, which were for the period from 8 August 1979 until 31 December 1980, the period in which the seven lots were acquired. The submission on this is in paras 10 to 17 of the appellant's notes of submission. The balance sheet as at 31 December 1980 has an item described as Land and Development Expenditure, of RM19,177,786. Although that item appears immediately after fixed assets, it stands on its own and not as an item of fixed assets. The sum of RM19,177,786 comprises freehold land valued at RM17,977,000, which is the seven lots that the appellants purchased on 28 March 1980, four of which are the subject land, and RM1,200,786 development expenditure. Since the seven lots had been purchased for RM6,100,000, the value of RM17,977,000 means that the appellants had revalued them and given them an increase in value of RM11,877,000. From that amount the appellants deducted a sum of RM5,999,997, being the value of shares at RM1 each that had been issued to members as fully paid. The balance of RM5,877,003 is shown in the balance sheet as capital reserve.

[64] The appellants acknowledged that if the seven lots had been shown as part of fixed assets, it would be a point in their favour as indicating that the lots were held as an investment, but that as it was not so shown, there was no point in their favour in that respect. They further acknowledged that if the lots had been shown as part of current assets it would have been a point against them as indicating an intention to trade, but as they were not so shown, the appellants submitted that there was no point against them in that respect. The appellants' point was that the fact that the seven lots had been revalued with an appropriate provision for capital reserve from the increase in value reflected their intention to hold the land as an investment. In fact, in para 11 of the appellant's notes of submission the appellants asserted that the factor of revaluation was 'the factor which supports the appellants' intention of holding the said land as an investment', the definite article 'The' giving the impression that it was the only or the most important factor. For their argument that the fact of revaluation bore the significance of indicating intention of investment, the appellants relied on the first sentence of para 5 of Technical Bulletin 2 issued by the Accounting and Auditing Standards Committee of The Malaysian Association of Certified Public Accountants, which says: 'Generally accepted accounting principles dictate that it is appropriate to consider revaluation only

for those assets which are intended to be held for the long term'. This means that if the appellants had followed generally accepted accounting principles they would not have revalued the land unless they intended to hold it 'for the long term'.

[65] I do not find that the Special Commissioners did deal specifically with this argument that relies on the fact of revaluation and the first sentence of para 5 of Technical Bulletin 2. What the Special Commissioners did was to conclude, at p 26 of the Case Stated, that there was a doubt as to the actual classification of the land because in para 11 of Technical Bulletin 2 the Accounting and Auditing Standards Committee recommended that land held for development and resale should be classified under current assets and that land held for long-term investment should be classified as a long-term asset, which I take to mean fixed asset, but in the appellants' balance sheet the land was neither classified as a fixed asset nor as a current asset but as, according to the Special Commissioners, 'Development Properties'. I did wonder whether before the Special Commissioners the appellants did raise this argument which before the High Court, as I said, they seem to treat as their fundamental argument, but when I examined the respondent's notes of submission in the High Court, which were in reply to the appellants', I do not find the respondent saying that the argument had not been raised before the Special Commissioners. I therefore assume that the argument was raised before the Special Commissioners.

[66] The respondent replied to the argument in paras 14 and 15 of the respondent's notes of submission. He did not dispute that in the light of the first sentence of para 5 of Technical Bulletin 2 the fact of revaluation was capable of being an indication of an intention of investment, but he raised two factors as factors that militated against such an indication. One factor, in para 14, is the fact that the land was not classified as a long-term or fixed asset, the argument being that if the land, as contended by the appellants, was intended for investment it would have been so classified. I think the fact that the land was not classified as a fixed asset is a neutral factor that ought not to be set up against a positive factor in order to neutralise it. If the land had been classified as a fixed asset, the controversy would probably not have arisen at all. It requires a negative factor, that is a factor that positively shows otherwise, to negate a positive factor. The other factor, raised by the respondent in para 15, is the fact that 'the appellants who declare themselves to be property developers' purchased 'land described as development properties by the appellants', the point being that 'development properties are not investment in such circumstances'. The argument in para 15 can be developed into a proposition that a property developer who buys land that he intends to develop cannot be heard to say, or be allowed to show, that he bought the land intending it as an investment. But I do not see why it cannot be that a property developer buys land to develop and yet to keep as an investment and not to sell it. The learned judge,

like the Special Commissioners, did not deal with this specific argument of the appellants that relies on the fact of revaluation and para 5 of Technical Bulletin 2. Neither did the respondent, in his written submission in this appeal, the respondent's brief submission, deal with it.

[67] Incidentally, the term 'development property' by which the Special Commissioners and the respondent referred to the land is, I think, their own term. It is not a term used in the balance sheet. As I said, in the balance sheet, the relevant entry is land and development expenditure. They probably concluded that since, in relation to the land, development expenditure was provided, the land was intended for development and they therefore decided to refer to it as 'development property'.

[68] In para 18 of the appellant's notes of submission, the appellants argued that their intention to hold the subject land as an investment, as indicated by their revaluation of the land, 'continued and was resubstantiated' by a statement made by the Chairman of Hoklian Holdings Berhad. That is the appellants' second ground in their written appellant's brief submission. It is necessary to set out the facts concerning this aspect of the case. On 20 August 1982 the Kuala Lumpur Planning Authority granted the appellants planning permission to build a 31-storey office block on the subject land. On 1 April 1983 three agreements were entered into for the sale by the three shareholders of the appellant company of the entire issued 6,000,000 shares in the appellant company to Hoklian Development Sdn Bhd and Koperasi Jayadiri Malaysia Berhad ('KOJADI') for RM41,250,000. Hoklian Development was a wholly-owned subsidiary of Hoklian Holdings Bhd. In the Annual Report of Hoklian Holdings dated 4 June 1983, the Chairman of that company, which wholly owned Hoklian Development, said this:

> The company has also through its wholly-owned subsidiary, Hoklian Development Sdn Bhd, entered into a joint-venture with Koperasi Jaya Diri Malaysia Bhd, on a 50 : 50 basis, to acquire the entire issued capital of ALF Properties Sdn Bhd for $41.25 million. The agreement for the said acquisition has been signed with the shareholders of ALF Properties Sdn Bhd recently. ALF Properties Sdn Bhd owns a piece of land exceeding 190,000 sq ft at the junction of Jalan Ampang and Jalan Yap Kwan Seng, Kuala Lumpur. Plans are being made to develop the said land into an office complex for rental. The Board foresees the prevailing good demand for office space in Kuala Lumpur will enable the company to enjoy very good rental income.

[69] That was the statement that the appellants relied on. According to the case stated, at p 8, among the facts proved was that 'The new management on taking over applied for the original development to be amended to build a 30-storey office building and approval was granted vide development order dated 24 April 1985'. The new management must refer to the appellants' management that came into being after Hoklian Development and KOJADI

bought the appellant company. The development order was a planning permission and was related to the subject land.

[70] The land mentioned in the statement by the Chairman of Hoklian Holdings was the entire land, that is the seven lots, including the subject land. What the appellants relied on as indicating their intention to hold the subject land as an investment was the statement that plans were being made to develop the entire land into an office complex for rental. It was the intention of renting the office complex, as opposed to selling it, that was important to the appellants' case. That would be an indication of an intention to hold the land as an investment. That plans were being made to develop the land into an office complex could not be seriously disputed because it was a fact that planning permission had been granted twice for the purpose, once before and once after the making of the statement. What could be disputed was the statement that it was the appellants' intention to keep the office complex for rental.

[71] On p 21 of the case stated the Special Commissioners listed five reasons for finding that the Chairman's statement 'loses its value and efficacy'. As reason (iv), the Special Commissioners said: 'The three valuation reports in the agreed bundle of documents (exh B) indicate, contrary to what is contained in the Chairman's Statement, that not all the land was approved for commercial use'. It seems to be directed against the Chairman's statement as to the appellants' intention to develop 'the said land', which referred to the entire land, into an office complex. It seems to suggest that the statement is questionable because it spoke of the entire land being developed into an office complex whereas planning permission for the purpose had been given only for the subject land. Viewed strictly in that manner the Chairman's statement was of course not correct, but when applied to the subject land, it was correct because it is a fact that before the making of the statement the appellants had applied for and obtained planning permission to build an office complex on the subject land. It was, I think, merely a matter of the Chairman not being particular to express himself with absolute precision.

[72] The Special Commissioners' reasons (i) to (iii) may be reduced to one reason and were applicable to the Chairman's statement that the plan for the office complex that was to be built was to earn rental from it. The reason is that the Chairman's statement was not the appellants' statement but was only one emanating from a party which, while anticipating the acquisition of 50% interest in the appellant company, had not yet acquired it, so that the intention mentioned by the Chairman cannot be accepted as proof of the appellant company's intention.

[73] The appellants' basic argument before the High Court, which was in paras 20 and 21 of the appellant's notes of submission and which, by adoption,

was their argument in this appeal, was essentially that since Hoklian Development and KOJADI were equal shareholders in the appellant company, they must have been in agreement on their plans as to the running of the company, as otherwise it would not be possible to run the company. The implication of that argument is that, for that reason, the intention of the Hoklian side must have been the intention of KOJADI as well. I think that it is a naive and simplistic argument. In the ordinary course of nature two independent people cannot always be in agreement on everything. They are bound at some point to disagree over a particular matter although in the end, for the common benefit, one may concede to the other. It cannot be assumed that when the Chairman of Hoklian Holdings made the statement on 4 June 1983 KOJADI had agreed that the planned office complex should be let out for rental. KOJADI might have wished that it be sold. In the end, so that, as the appellants' line of reasoning went, it would be possible to run the company, they might have reached an agreement, but it does not necessarily mean that KOJADI agreed with Hoklian Holdings and not the other way round. In the appellant's brief submission in this appeal the appellants point out that a director of Hoklian Developments was also a director of the appellant company, but that fact can in no way render the Chairman's statement proof of the appellant's intention as to rental.

[74] In the appellant's brief submission the appellants also cite a passage from *Waylee Investment Ltd v Commissioner of Inland Revenue* [1990] STC 780, inwhich the taxpayer company was a wholly-owned subsidiary of a bank. The passage reads:

> Counsel for the taxpayer rightly insists, and counsel for the commissioner accepts, that the issue is whether the acquisition of the shares in question in 1975 and their disposal in 1979 was an adventure or concern in the nature of trade on the part of the taxpayer which was a separate legal entity from the bank and which, it is accepted, was not acting as a mere agent for the bank. At the same time it is common ground that the taxpayer's purpose in relation to the transaction cannot be distinguished from the purposes of those who effectively controlled its activities. This means, in effect, that the taxpayer's purpose reflected the bank's purpose.

[75] The point is in the second and third sentences. It is to be noted that it was a matter of common ground and not a ruling. It may be reduced to the proposition that the intention of a wholly-owned subsidiary company in respect of a particular transaction may be judged from the intention of the holding company because the holding company effectively controls the subsidiary company's activities. Even assuming that that is the law, it cannot be applied to this case because the appellant company was not under the exclusive control of Hoklian Developments or Hoklian Holdings and was not their wholly-owned subsidiary.

[76] The appellants have therefore not succeeded in showing that the Special Commissioners erred in his finding about the statement of the Chairman of Hoklian Holdings.

[77] The appellants' third ground is that they had to sell the subject land because KOJADI needed funds. This ground is based on the following statement by Sharma J in *NYF Realty Sdn Bhd v Comptroller of Inland Revenue* [1974] 1 MLJ 182 at p 183 C (right):

> If sale of property is occasioned by sudden emergency or unanticipated need for funds, such facts will tend to indicate that the property was not acquired for the purpose of resale at a profit and that the sale was not pursuant to a profit making undertaking or scheme.

[78] This ground, as it was presented to the Special Commissioners, is set out as follows at p 38 of the case stated.

> KOJADI which owns the other 50% equity in the appellants was adversely affected by the Co-operatives Crisis in 1986. It was one of the 24 Co-operatives under investigation by Bank Negara which imposed a total freeze on all the assets and operations of the Co-operatives under investigation. In order to avoid receivership KOJADI had to obtain a RM7 million term loan and RM5.5 million overdraft facilities to make full refund to all its depositors. As a result KOJADI was in urgent need of funds as the loan and overdraft were repayable within three years.

[79] The Special Commissioners said that they were unable to consider the matters in the passage quoted because there was no evidence to prove those matters. They went on to say at p 38 of the case stated: 'Neither was evidence adduced to show that payments were made by the appellants to KOJADI to enable them to discharge their liability after the sale of the subject land'.

[80] In paras 71 to 73 of the appellant's notes of submission in the High Court, the appellants said that the Special Commissioners misdirected themselves in their said decision because evidence in support of their submission was tendered in 'exh E at folios number D5, D6 and D7' which 'show that KOJADI was under investigation by Bank Negara, with its assets frozen by Bank and KOJADI had obtained a term loan of RM7 million and overdraft facilities of RM5.5 million which had to be repaid within three years'. It would appear that those letters do show the existence of the matters claimed by the appellants, which are actually KOJADI's financial problems and needs, and to that extent the Special Commissioners might have misdirected themselves. But while KOJADI might have financial needs, it does not follow that it was the appellants who were to come, and did come, to their rescue. It is the rescue that is important because it was contended that the subject land was sold to rescue KOJADI. The Special Commissioners were right in saying that there was no evidence of the rescue. There was therefore no evidence that the subject land was sold because of the need to obtain money to rescue KOJADI.

[81] The appellants' fourth and last ground in the appellant's brief submission in this appeal relies on the fact that the subject land was held for ten years before it was sold. This ground is based primarily on the following statement by Sharma J in *NYF Realty Sdn Bhd v Comptroller of Inland Revenue* at p 183 H left:

> The fact that property is held but a short time after its acquisition may tend to indicate that the purpose of acquisition was resale at a profit.

[82] The appellants, in para 55 of the appellant's notes of submission in the High Court, drew from that statement the corollary that 'the fact that the said land was held for as long as 10 years may tend to indicate that the purpose of acquisition was for investment'. I do not think that such a corollary necessarily follows from Sharma J's statement. While the shortness of the holding period may be a positive indication of a trading purpose, it does not necessarily follow that a long holding period is a positive indication of an intention to invest.

[83] As an actual case of land held for a long time between acquisition and sale, the appellants, before the Special Commissioners, cited *Bukit Yew Sdn Bhd v Director-General of Inland Revenue* [1987] 2 MLJ 379, where Harun J (as he then was), in a list of nine reasons why he found that the decision of the Special Commissioners could not be upheld, included the following reason at p 383 E (right):

> The fact that the land was held for more than 14 years undeveloped and earning no income should have tilted the scales in favour of the appellants.

[84] The Special Commissioners held that that statement was inapplicable to the facts of the case before them. This is what they said at pp 35 and 36 of their case stated:

> Thus in *Bukit Yew Sdn Bhd v DGIR* [1987] 2 MLJ 379 Harun J (as he then was) held that the fact that the land was held for more than 14 years undeveloped and earning no income should have tilted the scales in favour of the appellant. That is not the position in the case of the appeal before us. The subject land was not undeveloped. It was ripe for development. As a result the value of the land had greatly enhanced. As the valuation report dated 6 April 1983 discloses no development was carried out at that stage as the approved building plans were found to be uneconomical and unsuitable. That explains the delay for dealing with the land. The original development plans were then amended. From 1987 to 1990 a part of the subject land was rented out. In the event the decision of Harun J (as he then was) in the *Bukit Yew Sdn Bhd* case is inapplicable to the facts of this case as the subject land was ready for development and earning income coupled with the other features of the case.

[85] The appellants made only a weak attempt to show that the Special Commissioners' decision about *Bukit Yew* was wrong. In the High Court and, by adoption, in this court, this was all that they said in the appellant's notes of submission:

> 60 The Special Commissioners at p 35 of the case stated also proceeded to distinguish the case of *Bukit Yew Sdn Bhd v DGIR* [1987] 2 MLJ 379 … However, the facts of the *Bukit Yew* case are closer to the facts in this appeal.
>
> 61 In the *Bukit Yew* case, … the said property in question was the sole asset of the appellant and was sold after 14 years. Similarly, in this case, the said land was part of the sole acquisition of property by the appellant and was held for 10 years before it was sold.

[86] Those paragraphs fail to address the Special Commissioners' reasons for holding that *Bukit Yew* was inapplicable to the present case. I am therefore unable to find that the Special Commissioners were wrong in declining to find in favour of the appellants on the fact that the subject land was held for ten years by the appellants.

[87] So of the four grounds that the appellants rely on in this appeal for contending that the seven lots, which included the subject land, were acquired as an investment, there is in their favour only one ground, the first ground in the appellant's brief submission, namely the ground that relies on the fact that the appellants revalued the land after purchasing it, when seen in the light of the first sentence of para 5 of Technical Bulletin 2. In view of that sentence, the fact that the appellants revalued the land comprised in the seven lots may be taken as an indication that they bought the land intending to hold it as an investment, but it is only an indication and it is not conclusive proof of such intention.

[88] Against that factor has to be weighed other factors that the Special Commissioners found to be positive indications to the contrary. The Special Commissioners saw several such factors but I wish to mention only one, because I do not think that the others, such as the finding that the proceeds of sale of the land were not shown separately from the operation fund and the fact that steps had been taken to make the land ripe for development, are clearly or necessarily positive indications to the contrary. The one factor that I wish to mention is the fact that in the appellants' balance sheet as at 31December 1991 a sum of RM13,082,923 is shown as provision for taxation as a current liability for 1991. It has to be borne in mind that the subject land was sold in 1990. In relation to this provision for taxation the Notes to the Accounts give this explanation: 'Taxation is provided for on the basis of amount estimated to be currently payable based on computed taxable income.' The Special Commissioners viewed this as 'A matter of significant concern.' They said: 'Is there a need to compute the amount of tax payable and include it in the accounts if no such tax is payable? If the tax computation is to be regarded as, say, an act of prudence on the part of the appellants they ought to have led evidence to explain the rationale behind it which they did not'.

[89] In the High Court and, by adoption, in this court, the appellants said as follows in the appellant's notes of submission:

> 88 The Special Commissioners were of the view that by having such an item in the 1991 audited accounts, the appellant was acknowleding (sic) that there is income tax payable on the profits from the sale of the said Land.
>
> 89 However what should also have been considered is the fact that no such provision was made in the 1990 audited accounts, when the profits were realised was consistent with the appellant's contention that the profits were realisation of an investment. That was why no provision was made for income tax in 1990.
>
> 90 In 1992, while finalising the 1991 audited accounts, the income tax assessment of RM13,185,916.09 for the year of assessment 1991 was received and accordingly based on the accounting concept of prudence, provision was made for the tax in the 1991 audited accounts by the appellant despite disagreeing with the tax charged.

[90] The appellants, in para 88, perceived that the Special Commissioners were of the view that the provision for taxation was an acknowledgment by the appellants that income tax was payable on the profits from the sale of the subject land. To show that that view was erroneous, in para 90 the appellants explained that after receiving the income tax assessment of RM13,185,916.09 they considered it prudent to include the amount assessed in the balance sheet as a current liability, obviously because, although maintaining that they were not liable to the tax, they might ultimately be held liable.

[91] That explanation, however, is demonstrably untrue, although the judge did not deal with it. The 1991 accounts, which included the balance sheet, was certified on 3 April 1992, but the Notice of Assessment of the sum of RM13,185,916.09 was dated 9 July 1992, well after the 1991 accounts were prepared and certified. The appellants had already provided for tax in the sum of RM13,082,923 in their accounts even before they received the assessment in the sum of RM13,185,916.09. The explanation given being untrue, there is no explanation to show as erroneous the Special Commissioners' view that here was an acknowledgment by the appellants that income tax was payable on the profits from the sale of the subject land. The acknowledgment implies an admission that the subject land was purchased and held for trade and neutralises or nullifies the sole indication that it was purchased for investment. The appellants have therefore failed in this appeal to show that the Special Commissioners erred in finding that the appellants failed to show that the subject land was held as an investment, and accordingly they have failed to show that the judge was wrong in dismissing their appeal.

[92] This appeal has been allowed by a majority decision on 14 May 2005, when I was as yet not ready with a decision on my part. With the benefit of

the views that I have now formed, I would have decided that the appeal be dismissed.

Appeal allowed.

Reported by Peter Ling